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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 1044.

ARTEMAS ROBERTS, PLAINTIFF IN ERROR,

vs.

WALTER F. LEWIS.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED OCTOBER 21, 1893.

(15,428.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 23, 1894.

1 In the United States Circuit Court of Appeals, Eighth Circuit. No. 258. May Term, A. D. 1893.

ARTEMAS ROBERTS, Plaintiff in Error, vs. WALTER F. LEWIS, Defendant in Error. } In Error to the Circuit Court of the United States for the District of Nebraska.

In the above-entitled case, which is now pending in the United States circuit court of appeals for the eighth circuit on a writ of error to the circuit court of the United States for the district of Nebraska, it is hereby certified that the following facts appear—that is to say:

First. That on May 10th, 1869, Jacob Dawson duly made his last will and testament, which was duly probated in the probate court of Lancaster county, State of Nebraska, after the death of said Dawson, and some time in the year 1869. Said will was as follows:

"In the name of God, amen: I, Jacob Dawson, of the town of Lincoln, in the county of Lancaster and State of Nebraska, being of sound mind and memory, and considering the uncertainties of this frail and transitory life, do therefore make, ordain, publish and declare this to be my last will and testament; that is to say: After all my lawful debts are paid and discharged, the residue of my estate, real and personal, I give and bequeath and dispose of as follows, to wit: To my beloved wife, Editha J. Dawson, I give and bequeath all my estate, real and personal of which I may die seized, the same to be and remain hers, with full power, right and authority to dispose of the same as to her shall seem most meet and proper, so long as she shall remain my widow, upon the express condition, however, that if she should marry again, then it is my will that all of the estate herein bequeathed, or whatever may remain, should go to my surviving children, share and share alike; and in
2 case any of my children should have deceased leaving issue, then the issue so left to receive the share to which said child would be entitled. I likewise make, constitute and appoint my said wife, Editha J., to be executrix of this my last will and testament, hereby revoking all former wills made by me.

"In testimony whereof, I have hereunto subscribed my name on this tenth day of May, in the year of our Lord, one thousand eight hundred and sixty-nine.

"JACOB DAWSON."

Second. That at the time of the death of said Jacob Dawson he had a perfect title to lots one (1), two (2), three (3), four (4), five (5), and six (6), in block forty-one (41), in Dawson's addition to South Lincoln, Lancaster county, Nebraska, which is the property in controversy in the above-entitled suit.

Third. That on March 15th, 1870, Editha J. Dawson, the wife and then widow of said Jacob Dawson, deceased (acting by and through her attorney-in-fact, thereunto duly authorized), conveyed said last-described property, by warranty deed, to Paran England; and on December 15th, 1871, said Paran England duly sold and conveyed

the same property, by warranty deed, to Artemas Roberts, the plaintiff in error in the above-entitled cause, who has ever since been in the peaceable possession of said property, claiming to own the same in fee simple.

Fourth. That on December 14th, 1879, said Editha J. Dawson intermarried with one Henry M. Pickering.

Fifth. That on September 15th, 1879, all of the surviving children of Jacob Dawson, deceased (to wit, William R. and Albert Dawson and their wives and Evaline Dawson Knicely and husband and Matilda Dawson and Minnie S. Dawson), executed and delivered to Hiland H. Wheeler and Lionel C. Burr a warranty deed for all of said lots heretofore described; that said Wheeler and Burr thereafter executed and delivered a deed for said premises to Ezekiel Giles, and that in the month of May, 1887, said Giles and wife duly sold and conveyed said premises, by warranty deed, to Walter F.
3 Lewis, who is the defendant in error in the above-entitled cause.

Sixth. During the period that the title to the aforesaid lots was so as aforesaid vested in said Ezekiel Giles he brought an action against one Little to recover a lot of land situated in the city of Lincoln, Nebraska, which had belonged to said Jacob Dawson at the time of his decease, and which said lot the said Little had acquired and held under a warranty deed executed by the aforesaid Editha J. Dawson after the death of her husband and prior to her remarriage with said Henry M. Pickering. In said suit of Giles *v.* Little said Giles claimed under the title above described, on which his grantee, the defendant in error in the above-entitled cause, now relies and claims. Said suit of Giles *v.* Little having been taken to the Supreme Court of the United Staies on writ of error, it was ruled by said court, in the month of October, 1881 (*vide* 104 U. S., 293), that under the aforesaid will of said Jacob Dawson his said widow, Editha J. Dawson, only "took an estate for life in the testator's lands, subject to be divested on he*a*r ceasing to be his widow, with power to convey her qualified life estate only," and that "her estate in the land and that of her grantees determined on her marriage with Pickering."

Seventh. Subsequent to the aforesaid decision in Giles *v.* Little a suit was brought in the district court of Lancaster county, Nebraska, by various grantees of said Editha J. Dawson, who claimed under said will of said Jacob Dawson, against Ezekiel Giles to quiet their title against the title which said Giles had succeeded to, in the manner hereinbefore stated, by mesne conveyances under the deed executed by the children of Jacob Dawson on September 15th, 1879. Said last-mentioned suit having been taken by appeal from the district court of Lancaster county to the supreme court of the State of Nebraska, it was held by said supreme court, at its January term, 1889 (*vide* Little *v.* Giles, 25 Neb., 313–334), that the aforesaid will of Jacob Dawson, deceased, under the statutes of the State of
4 Nebraska, enabled his widow, said Editha J. Dawson, prior to her remarriage, to convey an estate in fee simple in any of the lands whereof her deceased husband had died seized.

Eighth. The above-entitled suit, now pending on writ of error in the United States circuit court of appeals for the eighth circuit, was begun in the United States circuit court for the district of Nebraska on June 11th, 1887, and was a suit in ejectment, brought by Walter F. Lewis against Artemas Roberts to recover possession of the six lots of land heretofore described. It does not appear at what time the suit of Little *v.* Giles, 25 Neb., 313, was first instituted in the district court of Lancaster county, State of Nebraska—that is to say, it does not appear whether the last-mentioned suit was instituted prior or subsequent to the conveyance made by Giles to Walter F. Lewis in the month of May, 1887.

5 In view of the premises, the circuit court of appeals hereby certifies to the Supreme Court of the United States the following questions or propositions of law arising in the above-entitled case, concerning which it desires the instruction of that court for its proper decision of the case now pending before it:

First. In determining the nature of the estate that became vested in said Editha J. Dawson under said will of her deceased husband, Jacob Dawson, in and to lands situated in the State of Nebraska, whereof said Jacob Dawson died seized and possessed, should the circuit court of appeals be governed by the decision of the United States Supreme Court in Giles *v.* Little, 104 U. S., 291, 300, or by the subsequent decision of the supreme court of the State of Nebraska in Little *v.* Giles, 25 Neb., 313, 334?

Second. Did the aforesaid will of Jacob Dawson vest his widow with such an estate in lands whereof the testator died seized, situated in the State of Nebraska, that during her widowhood she could convey to third parties an estate in fee simple therein?

Third. Should the construction of the will of Jacob Dawson, deceased, which was adopted by the Supreme Court of the United States in Giles *v.* Little, 104 U. S., 291, be adhered to by the United States circuit court of appeals for the eighth circuit in determining the right of Walter F. Lewis in and to the property heretofore described, in view of the fact that said Walter F. Lewis purchased said property subsequent to the promulgation of said decision in Giles *v.* Little and prior to the decision of the supreme court of the State of Nebraska in the case of Little *v.* Giles, 25 Neb., 313?

In witness whereof the undersigned judges, holding the said United States circuit court of appeals for the said eighth circuit, have hereto set their hands this 16th day of October, A. D. 1893, at St. Paul, Minnesota, and ordered and directed that the foregoing certificate be filed in said circuit court of appeals, and by the clerk of said court be duly forwarded to the Supreme Court of the United States.

HENRY C. CALDWELL,
Circuit Judge.
WALTER H. SANBORN,
Circuit Judge.
AMOS M. THAYER,
District Judge.

6 UNITED STATES OF AMERICA, } ss:
Eighth Circuit, }

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing certificate in the case of Artemas Roberts, plaintiff in error, *v.* Walter F. Lewis was duly filed and entered of record in my office by order of said court, and, as directed by said court, the said certificate is by me forwarded to the said Supreme Court of the United States for its action thereon.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Saint Paul, Minnesota, this 16th day of October, A. D. 1893.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals for the Eighth Circuit.

7 [Endorsed:] U. S. circuit court of appeals, eighth circuit, May term, 1893. No. 258. Artemas Roberts, plaintiff in error, *vs.* Walter F. Lewis. Certificate of questions to Supreme Court U. S. Filed Oct. 16, 1893. John D. Jordan, clerk.

Endorsed on cover: Case No. 15,428. U. S. circuit court of appeals, 8th circuit. Term No., 1044. Artemas Roberts, plaintiff in error, *vs.* Walter F. Lewis. Filed October 21st, 1893.

1044

MAR 24 1894
JAMES H. McKENNEY,
CLERK

No. 153-367

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1893.

ARTEMAS ROBERTS,
Plaintiff in Error.
vs.
WALTER F. LEWIS,
Defendant in Error.

ON CERTIFICATE OF QUESTIONS FROM THE U. S. CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

N. S. HARWOOD AND JOHN H. AMES,
Attorneys for Plaintiff in Error.

Calhoun & Woodruff, Printers, Lincoln.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

ARTEMAS ROBERTS,
Plaintiff in Error.

vs.

WALTER F. LEWIS,
Defendant in Error.

ON CERTIFICATE OF QUESTIONS FROM THE U. S. CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

N. S. HARWOOD and
JOHN H. AMES,
Attorneys for Plaintiff in Error.

In as much as the questions certified to this court are fully discussed in the brief of plaintiff in error, filed with the Circuit Court of Appeals, we, for the purposes of this hearing, reprint that brief, adding a short criticism of some of

the authorities and statements contained in the brief of the defendant in error, and supplementing the whole with a reprint of a portion of the brief used by counsel for plaintiff in error on the hearing of Little against Giles, in the Supreme Court of the State of Nebraska. This supplement is added because of the suggestion of Mr. Justice Gray, when the present case was formerly before this court, that your honors may deem it proper to inquire whether the opinion of this court in Giles against Little, 104 U. S., 291, or the opinion of the Supreme Court of Nebraska, in Little against Giles, 25 Nebraska, 313, announces the correct construction of the will in controversy. And because, also, the facts and arguments used, seem to us to illustrate the practical necessity of the rule contended for, viz: that in case of a conflict in cases of this kind between federal and state courts, the latter should prevail.

Notwithstanding the great respect which we entertain for the learning and ability of the members of this court as constituted when the former decision was rendered, we have never been able to convince ourselves that they did not fall into an error in pronouncing the opinion mentioned; and we respectfully invite the careful attention of your honors to the argument and authorities cited in the supplementary portion of the present brief.

STATEMENT OF CASE.

On the 22d day of June, 1869, one Jacob Dawson died in Lancaster county, Nebraska, seized of the real estate in controversy herein, and leaving him surviving, his wife, Editha J. Dawson, and six children. Before his death he

had executed his last will and testament, which was afterward duly admitted to probate, which contained the following sole bequest:

"After all my lawful debts are paid and discharged, the residue of my estate, real and personal, I give, bequeath and dispose of as follows, to-wit: To my beloved wife, Editha J. Dawson, I give and bequeath all my estate, real and personal, of which I may die seized, the same to remain and be hers with full power, right and authority to dispose of the same as to her shall seem meet and proper, so long as she shall remain my widow, upon the express condition that if she shall marry again, then it is my wish that all the estate herein bequeathed, or whatever may remain, shall go to my surviving children share and share alike; and in case any of my children should have deceased, leaving issue, then the issue so left to receive the share to which said child would be entitled. I likewise make, constitute and appoint my said wife, Editha J., to be the executrix of this my last will and testament."

Editha J. intermarried with one Pickering, on or about the 15th day of November, 1879, and subsequently an action was begun by one Giles, the grantee of the surviving children of Jacob, against Little, the grantee of the widow, of certain of this estate, for the purpose of obtaining the construction of this will; which action was carried to the Supreme Court of the United States, by writ of error, and was disposed of in that court by an opinion in which it was held that the widow acquired under the will, a life estate, only, terminable upon her marriage; and that upon the happening of that event, the children of the testator, or their grantees, were entitled to recover possession. The

judgment of the Circuit Court in that case being thus reversed, the judgment was also reversed, and the action remanded for a new trial; but the case was subsequently dismissed without trial upon the merits. Afterwards another action was begun in the state courts, by the grantees of the widow, to quiet their title against the grantees of the children, which was removed to the Circuit Court of the United States, and in which a decree was entered upon cross bill, in favor of the holders of the titles derived from the children. This cause was appealed to the United States Supreme Court, and by that court reversed by an opinion found in the 118th United States, at page 596, and remanded to the State Court for trial, upon the ground that the Circuit Court had not jurisdiction of the parties. This cause was subsequently tried in the District Court of Lancaster county, Nebraska, and upon appeal to the Supreme Court of the state, it was decided in Little against Giles, 25th Nebraska, 313, that the construction put upon the will by the Supreme Court of the United States, was not in harmony with the statute and the policy of the law relative to wills and the disposition of real estate by testamentary bequests, of the State of Nebraska, and it was there held that the widow acquired by the will a valid title in fee simple to the lands in controversy. Pending this action in May, 1887, Giles who was the immediate grantee of the children, and a party to all these litigations, conveyed the land in controversy in this suit, to the defendant in error, who began this action on the 20th day of June following. This was an action in ejectment or "An action for the recovery of real property," as it is named by the Code of Civil Procedure of the State of Nebraska, brought by the defendant in error in the United States Circuit Court for the District of Nebraska,

for the purpose of trying the title to certain building lots which are situated in the city of Lincoln, in said state, and of which the plaintiff in error was, and for more than fifteen years prior to the beginning of said action had been in the possession, and claiming to the owner. The petition after the jurisdictional affirmations, is as follows, (Record, page 1.)

"Second. The plaintiff further complains of the defendant for that plaintiff has a legal estate in, and is entitled to the immediate possession of the following described property, to-wit: Lots 1. 2, 3, 4, 5 and 6, all in block number 41, in Dawson's Addition to South Lincoln, in Lancaster county, Nebraska; and that said defendant has ever since the 11th day of April, 1887, unlawfully kept, and still keeps the plaintiff out of possession thereof.

Wherefore the plaintiff prays that he may have judgment for the delivery of the possession of said premises to him, and for the costs of this action."

The answer is in the following words, (Record page 4:)

The above named defendant for a second amended answer to the petition of the plaintiff heretofore filed herein, a first defense thereto, denies each and every allegation in said petition contained, except he admits the citizenship of the parties as alleged. Second, and for a second and further defense to said petition, this defendant says that he is, and for more than ten years prior to the beginning of this action has been in the actual, open, notorious, exclusive, peaceable and adverse possession of all and singular the tracts and parcels of ground mentioned in said petition, claiming title to the same, and to the whole thereof, in fee simple. And

this defendant further says that the said plaintiffs' said alleged cause of action did not accrue within ten years prior to the beginning of this suit.

Wherefore the defendant prays to be dismissed hence with his costs."

This action resulted on the second day of April, 1888, in a judgment for the plaintiff, which, however, was reversed by the Supreme Court of the United States upon a writ of error, for the reason that the jurisdiction of the Circuit Court did not appear sufficiently upon the record; and on the 19th day of May, remanded for a new trial. See mandate, record, page 2; and on the 31st day of January, 1893, the cause was submitted to the judge without a jury, and resulted in a second judgment for the plaintiff, upon the stipulation of facts filed by the parties, which is as follows, see Record, page 10:

"It is stipulated that the records in the office of the Register of Deeds for Lancaster county, Nebraska, show a complete and perfect title of lots herein in dispute, to wit: 1, 2, 3, 4, 5 and 6, all in block No. 41, in Dawson's Addition to South Lincoln, in Lancaster county, Nebraska, from the Government of the United States down to and in Jacob Dawson, deceased.

2. That on the 10th day of May, 1869, the said Jacob Dawson made his last will and testament, which was duly probated in the probate court of Lancaster County, Nebraska, a true copy of which will is hereto annexed and made a part hereof, marked "Exhibit A."

3. That on the 15th day of January, 1870, said Editha J. Dawson, wife of said Jacob Dawson, being the said Editha J. Dawson mentioned in said will, made and executed a power of attorney to John H. Dawson, purporting to authorize him as her attorney in fact to sell and convey all of said property in fee, and on the 15th day of March, 1870, said Editha J. Dawson, by said John H. Dawson, pursuant to said power, duly executed and delivered her warranty deed covering the premises in controversy, to Paran England, and on the 15th day of December, 1871, said England and wife duly conveyed by warranty deed said premises to the said defendant. Artemas Roberts, who has ever since been in possession of the same, claiming the open, notorious, adverse, exclusive and peaceable possession of said premises, and of the whole thereof, claiming to own the same in fee.

4. On the 14th day of December, 1879, said Editha J. Dawson intermarried with one Henry M. Pickering; that on the 15th day of September, 1879, all the surviving children of Jacob Dawson, to-wit: William R. and Albert Dawson and their wives, and Evaline Dawson Knicely and husband, Matilda Dawson and Minnie S. Dawson, made, executed and delivered to Hiland H. Wheeler and Lionel C. Burr, a warranty deed of said premises, and on the 27th day of April, 1880, the said Wheeler and said Burr and his wife made, executed and delivered a warranty deed to Ezekiel Giles, of said premises, and that on the —— day of May, 1887, said Giles and wife made, executed and delivered a warranty deed to Ezekiel Giles of said premises, and that on the —— day of May, 1887, said Giles and wife made, executed and delivered a warranty deed to said premises in dispute, to the plaintiff in this action.

5. At the decease of said Jacob Dawson, he left real estate of the value of forty-eight thousand dollars ($48,000.00) and personal property of the value of $958 00.

6. The ages of his children were as follows: William R. Dawson, born September 12th, 1853; Albert L., born January 16th, 1856; Evaline M., born March 22nd, 1864; Minnie S., born November 9th, 1866; Matilda, born January 16th, 1858.

7. A jury is hereby waived in this cause, and the same is submitted to the court without the intervention of a jury."

Upon this record the plaintiff in error makes the following assignment of errors, Record, page 15:

1. That said judgment is erroneous in that it finds and adjudges upon the agreed state of facts submitted by the stipulations of the parties hereto: that the plaintiff is the owner of the property in controversy, and is entitled to have and recover the possession of the same, and of the whole thereof, and of damages for the wrongful detention of the same.

2. That said judgment is erroneous in that it does not find and determine that the defendant is and ought to be entitled to and protected in the possession of, at least an undivided three-fifths of the land in controversy, by the statute of limitations of the state of Nebraska.

3. That said judgment is erroneous, because under and by virtue of the will of Jacob Dawson, annexed to and made a part of the stipulation of facts in this cause, his widow, Editha J. Dawson, acquired at his decease, and upon the

probate of said will, the title in fee to all the property in controversy, with full right, power and authority to sell and convey the same, and it is agreed by said stipulation of facts, that the said Editha J. Dawson did, prior to the acquisition of the plaintiff's alleged title, sell and convey the same, by a good and sufficient warranty deed, to the defendant's grantor, Paran England.

4. That said judgment is erroneous, in that it is in direct conflict as respects the interpretation and effect of the said will of the said Jacob Dawson, deceased, which has been given to that instrument by the Supreme Court of the State of Nebraska; said interpretation and effect being, as said last named court has decided, based upon and derived from a statute of said state.

5. That said judgment is erroneous in that it is unsupported by and is contrary to the agreed facts submitted by the stipulation of the parties in said action, and is contrary to law.

POINTS AND AUTHORITIES.

In the syllabus of the opinion of the Nebraska court, which is prepared by the judges and has the same force as, and is in reality a part of the opinion itself, the following language is used:

"A devise. 'To my beloved wife, Editha J. Dawson, I give and bequeath all my estate, real and personal of which I may die seized, the same to remain hers with full power, right and authority to dispose of the same as to her shall seem most meet and proper, so long as she shall remain my widow, upon the express condition, however, that if she

shall marry again, then it is my will that all of my estate herein bequeathed, or whatever may remain, shall go to my surviving children share and share alike,' etc., *Held*, that under the statutes of this state a conveyance of such real estate by Editha J. Dawson after the death of the testator and before her remarriage, conveyed the fee to such realty, and her subsequent marriage did not affect the title to the same. "The words 'whatever may remain' in the will, apply to both the real and personal estate, and are restricted to such parts of the estate as remained undisposed of at the time of the second marriage of Mrs. Dawson."

And in the body of the opinion, the court say:

"The construction of the will in question by the United States Supreme Court, under the common law, had that controlled the case, therefore, no doubt was correct.

"The common law rule, however, has been changed in this state in two important particulars:

First. The term 'heirs,' or other technical words of inheritance, shall not be necessary to create or convey an estate in fee simple.

Comp. Stat, Chap. 23. Sec. 49.

And second:

Every devise of land in any will hereafter made shall be construed to convey all the estate of the devisor therein which he could lawfully devise, unless it should clearly appear by the will that the devisor intended to convey a less estate.

Comp. Stat., Chap. 23, § 124.

"The first of these sections is not referred to in the opinion of the United States Supreme Court, and probably the court's attention was not called to it; and the latter section was by mistake, no doubt, copied incorrectly, the word 'clearly' being omitted."

Giles vs. Little, 104 U. S., 299.

"Mr. Justice Wood, therefore, in writing the opinion, gave no weight to the section whatever. The section of the statute in question was copied from the statute of Michigan, and its proper construction was before that court in:

Wier vs. Mich. Stove Co., 44 Mich., 506, 7 N. W. R., 78.

Chandler vs. Shaw, 52 id., 18, 17 N. W. R., 223.

"In Wier vs. Mich. Stove Co. it is said. 'The language of the testator in the bequest to his wife is clear and unqualified, and unless restricted by what follows, should not be open to question. Does it clearly appear by what follows thereafter that the devisor intended to convey less than his entire estate to his wife? If there are doubts, then, under the statute, they must give way to the otherwise clearly expressed intention.

"In Dew vs. Kuehn, 64 Wis., 300, 25 N. W. R., 212, the Supreme Court of Wisconsin, under a statute substantially the same as our own, held that the statute 'changed the rule as to the presumption of the estate devised,' and such we understand to be the effect.

"In Robbins Exr. vs. Robbins, 9 S. W. R., 254, where the testator in his will had directed certain real estate sold as soon as the executor thought best for the estate, or his widow, the proceeds to be invested in bonds for her use, she was prohibited from loaning the proceeds, but permitted to use the interest as well as the rents. There were other devices of property to the wife, 'to do with as she might think fit.' The court held that she took an absolute fee in the land, in view of the Kentucky statutes that estates shall be deemed in fee simple unless a contrary intention appears."

This latter cause was begun in the state courts on the 27th day of January, 188 , removed thence to the Circuit Court of the United States for the District of Nebraska, where a decree was entered in accordance with the construction put upon the will in Giles vs. Little, 104 U. S., 291; and an appeal from that decree was taken to the Supreme Court, by whom it was reversed November 1st, 1886, opinion 118 U. S., 596, and the cause remanded to the state court for trial. The tracts of land involved herein were described by the pleadings, and the title thereto was intended to be litigated by the plaintiffs in the case last above mentioned, but by mistake the title thereto was alleged to be in a mortgagee, a relative of the plaintiff in error herein, instead of in himself. After that cause had been reversed and remanded by the Supreme Court to the State Courts, as above stated, and in May, 1887, Giles executed a deed to the defendant in error herein, and began this action on the 20th day of June, following.

The first question presented then is: Will this court adopt the interpretation of the will in Giles vs. Little, 104

U. S., 291, or will it follow that of the Supreme Court of Nebraska in Little vs. Giles, 25th Nebraska, 313? We think it will do the latter. It would suffice for this purpose if the rule of property in Nebraska in this respect had first been settled by the opinion in the last mentioned case; but it is more exact to say that it was settled by the enactment of the statute mentioned, which at the time of its enactment had already received a construction by the courts of the state from which it was adopted; which construction by a familiar rule of law, is regarded as having been incorporated into, and as having become a part of the statute itself, and as having equally with the text, influenced the mind of the legislature in adopting it. We think, however, that the opinion in Suydam vs. Williams, 24 Howard U. S., 427, which has never been departed from or shaken, and which case is in all essential particulars identical with the one now before the court, is conclusive of the question here under discussion. That case was an action in ejectment in the Circuit Court for certain lots of land in the City of New York by the defendants in error against the plaintiffs in error. The plaintiff in the Circuit Court claimed under a devise in the will of Mary Clarke, who died in the year 1802, by which she gave trustee therein named, that part of the farm upon which she resided, and which she called Chelsea, in trust, to receive the rents and profits thereof, and to pay the same to Thomas B. Clark; and further in trust to convey the same to the lawful issue of said Thomas B. Clarke, living at his death, in fee. The property in dispute was a portion of the estate of Thomas B. Clarke, who died in 1826, and the plaintiffs had the title to this property of his three children, who were living at his death. The will simply gave to Thomas B. Clarke and to his executors

the rights to receive the rents, issues and profits thereof to his use, and they were to convey to his heirs in fee. The question arose, what effect had certain acts of the legislature of the state of New York upon the construction of said will? Prior to this time the Supreme Court of the United States had construed the will under the enactments in such a way as to hold that the act of the legislature divested the fee out of the trustee who had previously held it, but did not vest in such person power to act in his place, and that the grantee of the purchaser from the latter did not obtain a valid title. Afterwards the state court put such a construction upon the same will and statutes as to hold that such purchaser from the trustee did acquire valid title in fee simple. A dispute thereupon arose between the partisans of the two courts, similar in its character to that now presented; and, so far as determining which of the dimetrically opposite judicial opinions shall be taken and adhered to as the law governing the case, the opinion in Suydam vs. Williams, *supra*, is in point, and as it seems to us, decisive; and in the opinion this court say:

"The judgment in Clarke vs. Van Surley is a determination of the court of last resort in that state, not only upon all the questions of law in the case under consideration, but upon the identical title under which the plaintiff in the reported case, and the defendant in the present case, claim to own the premises in controversy in the respective suits. * * * In such a case, there being no pretense of collusion, and no reason to impute carelessness or inattention to the judges, the determination should be considered final and conclusive upon all persons in interest, or who may become interested in the question, as well as upon the parties to the particular action. * * * And the question

is now presented to this court, whether they shall adhere to their own opinion as expressed in the case in 8th Howard, or acknowledge the authority of the courts of New York to settle finally the contest upon this title."

"The subject of the dispute is real property situate within the State of New York, and her laws exclusively govern in respect to the rights of the parties, the modes of transfer, and the solemnities which should accompany them. * * * Every sovereign has the exclusive right to command within his territory; and the laws which originate rights to real property are commands addressed to the members of the state, requiring them to abstain from any iterference with the proprietary right they recognize or establish; and in respect to this subject the sovereignty of New York has not been impaired by her adoption of the Federal Constitution. * * * The title of the devisees of Mary Clarke was divested by authority conferred by the Legislature of the state, which was exercised subject to the oversight of her own tribunals. The persons affected by this authority were natives of the state, children under the superintending care of the parental jurisdiction of the state. It was in the constitutional exercise of this supreme and exclusive jurisdiction that this title was disturbed. It behooves every other state to enforce or maintain rights which have thus originated in laws operating within their legitimate sphere, and which defeat no policy of their own; and the jurisdiction of this court attests the care with which this court has observed the general obligation, (of which this is particular instance), in its administration throughout the Union."

"The inquiry is very much narrowed by applying the rule which has uniformly governed this court, that where

any principle of law establishing a rule of real property has been settled in the State courts, the same rule would be applied by this court that would be applied by the same tribunals."

And in Henderson vs. Griffin, 5th Peters, 151, the court say:

"A deliberate decision by the highest court of a State of the question whether the statute of uses is part of the common law of a state, and as to the operation of tbe articles in a will of lands under that law, is received by this court as a rule of property there."

Many other decisions of the United States Supreme Court to the same effect might be quoted were it supposed to be necessary; but the whole question underwent a thorough re-examination by the late Mr. Justice Miller, speaking for the court in Bucher vs. Chesire R. R. Co., 125th U. S., 555, and the principles of the foregoing, among other similar decisions therein recited, were expressly reaffirmed. It is sufficiently evident that the courts of either the state or of the United States, must be permitted once for all to settle the question of this title. It would be intolerable that of two persons claiming under the same right, one should succeed because his antagonist was a citizen of the State of Nebra-ka, and another should fail because his antagonist was a citizen of another state, or that one should succeed because the value of the lands in controversy was less than two thousand dollars, while another should fail because the value of his lands exceeded that sum.

II.

This cause was tried and the judgment which is complained of in this proceeding was rendered nearly two years after the will in question had been construed by the Supreme court of the state and after the opinion of that court thereon in Little vs. Giles, had been published in the 25th Nebraska. Indeed, this decision had been rendered and this opinion published long before the former judgment in this case had been reversed and the cause remanded for a new trial by the Supreme Court of the United States. It seems to us, therefore, that the situation is now practically the same as though this action had been begun at the date of the reversal, or as though an action should now be begun on behalf of the heirs or their grantees against some other grantee of the widow. It can no longer be contended, as it seems to us, that the principle that the Circuit Court having obtained jurisdiction had the right to proceed in an orderly way to a final determination can be successfully invoked in support of the judgment at bar.

The interpretation of that principle and of the authorities relied upon by defendant in error in support of it, we understand to be this and nothing more: That the Circuit Court, being an independent tribunal, having a suit regularly before it, is not bound to await the decision of the state courts, or for the interpretation by the latter of statutes or documents involved in the litigation, but may proceed in orderly course to judgment, and that having done so, and its proceedings and judgments being free from error at the date of their occurrence, will not be held erroneous because the state courts have subsequently put a different construction upon the same matters, or extracted a different intent

or meaning from the same contracts or enactments. With this rule, the obvious necessity of which must be apparent to anyone upon the slightest reflection, we are content, but we conceive it to have no application to a case in which the determination of the state court is reached and made public years before the Circuit Court is called upon to decide upon the same matters, even although it be in an action previously pending.

If at the time when the Circuit Court renders its judgment, the force and effect of the instruments in controversy have been authoritatively determined by the tribunal which alone has the ultimate right to announce them, and the decision of the Circuit Court is not in conformity thereto, it can be no more truthfully said that the judgment is free from error at the date of its rendition than if the suit had been begun after the state court had published its opinion. While on the other hand to require of the Circuit Court conformity in a case already pending, interferes to no greater extent with the freedom of its judgment, and obstructs to no greater extent the independence of its exercise of its functions, than to require like conformity in an action subsequently begun. So that it seems to us that if the judgment in this case is affirmed that result can only be reached by the adoption of the principle expressly repudiated by the Supreme Court in Suydam vs. Williams, 24 How., 427, and that hereafter any non-resident of Nebraska holding the title to any tract of these lands which is held by the defendant in error, may, if the value is or shall become sufficiently great, successfully prosecute a suit for its recovery in the Circuit Court. This do trine is almost explicitly stated by his Honor, Judge Dundy, in the concluding para-

graphs of his opinions in this case, and it does not seem to us possible to affirm the judgment by any opinion in which it is not at least strongly implied.

Whether it is more presumptuous to recede from the opinion of the Supreme Court of the United States in Giles vs. Little, 104 U. S., 291, in deference to the contrary construction put upon the will and statute by the State Supreme Court, or to repudiate the principles of jurisprudence deliberately and carefully adopted in Suydam vs. Williams, and since repeatedly reaffirmed, we leave your honors to decide.

COMMENTS UPON BRIEF OF DEFENDANT IN ERROR.

We do not object to the doctrine contained in the following clause of the brief of defendant in error, which we think if adhered to, is sufficient for the reversal of the judgment of the Circuit Court in this case:

"We go to the judicial decisions for the interpretation of the written provisions, just as we go to the marts to learn the customs of commerce, and in both cases for the same purpose. The purpose is always to ascertain what the laws of the state are. Almost always questions of local law arise in the local courts before they do in the national courts; this is natural; and when the decisions in the former have been made in such wise as to be definitive, it is the duty of the latter to accept them and apply the law as expounded by them to proper cases; and this is because the law of the state is as its courts have declared."

We are equally well pleased with the citation of Morgan vs. Curtinius, 20 How., 1, and with the interpretation thereof, contained in brief of counsel for defendant in error:

"The plaintiff claimed under a patent issued to Bogardus in 1838. The defendant claimed under a deed made by Bogardus in 1834, purporting to 'grant, sell and convey' all of the interest of the latter, and also proved that the defendant paid Bogardus the consideration and took out the patent in the latter's name. The plaintiff moved to exclude all of the defendant's evidence, which motion was overruled, and this is the error complained of. It was contended that the deed was simply a quit claim, which did not estop the plaintiff to allege the after acquired title under the patent. There was a statute to the effect that a grantor, by deed purporting to convey a fee, not having the legal title at the time, but afterwards acquiring it, shall be taken to hold the same in trust for his grantee, and his deed be taken to be as valid as if he had the legal title when he made the same.

The case was tried at the Circuit court on the 8th of June, 1849. In 1845 the Supreme Court of the State in a case then before it construed the statute and held that under it the after acquired title inured to the grantee. Mr. Justice Grier delivered the opinion of the court; and, after stating the facts as above briefly recounted, said at this point: 'This construction of the statute was therefore a settled rule of property at the time of the decision of this case in the court below, which that court was bound to follow; and having so decided there was certainly no error in the decision at the time it was made.'

But in 1853 another case came before the State Court in which the same conveyance and the same statute were in question as in the former, and received a contrary construction. The learned judge then says: 'If the judgment of the Circuit Court in this case had been given since the last decision of the Supreme Court of Illinois, this court might have been compelled to decide whether they considered themselves bound to follow the last decision of that court or was at liberty to choose between them. But, however, the latter decision may have a retroactive effect upon the title held under the deed in question, it cannot have that effect upon decisions of the Circuit Court, and make that erroneous which was not so when the judgment of that court was given.' "

And so, too, with the quotation made by counsel from the opinion of this court in Burgess against Seligman, 107 U. S., 20, which is as follows:

"In the present case, as already observed, when the transaction in question took place, and when the decision of the Circuit Court was rendered, not only was there no settled construction of the statute on the point under consideration, but the Missouri cases referred to arose upon the identical transactions upon which the Circuit Court was called upon and which we are now called upon to consider. It can hardly be contended that the Federal Court was to wait for the State Courts to decide the merits of the controversy and then simply register their decision; or that the Circuit Court should be reversed merely because the State Court has since adopted a different view. If we could see fair and reasonable grounds to acquiesce in that view we should gladly do so; but in the exercises of that indepen-

dent judgment which it is our duty to apply to the case, we are forced to a different conclusion.

"Pease vs. Peck, 18 How., 595, and Morgan vs. Curtinius, 20 Id., 1, in which the opinions of the court were delivered by Mr. Justice Grier, are precisely in point."

And the counsel say in conclusion:

"It would serve no useful purpose to cite other cases to the same effect, or to seek to support by any reasoning what may be now considered one of the institutes of the law. There are cases which are sometimes cited as holding another doctrine," but an examination of their facts will show that they are entirely consistent with the contention of the plaintiff in error in this action.

It can scarcely be contended that the construction put upon this will by the Supreme Court of Nebraska, in 25th Nebraska, 313, was not, or is not, or was not intended to be deliberate and definitive as determining the construction of instruments of this character, and the rules to be adhered to for their interpretation under the Nebraska Statute: but in as much as this decision had been rendered and published long before the trial of this case in the Circuit Court, it came expressly within the implied exception pointed out in the opinion of the court in Burgess vs. Seligman, 107 U. S., 20, above quoted: and we entirely concur with the concluding paragraph of the discussion, by counsel, in the case of Suydam vs. Williams, 24th Howard, 427, and are well satisfied that if the interpretation there put upon the decisions of this court is applied to the case at bar, your honors will grant a reversal of the judgment of the Circuit Court:

"In each of these controversies the Federal Court yielded its first judgment, because when it was pronounced there were decisions of the State Court to which their due effect not been given. In the Williamson vs. Suydam case the court thought the courts of New York had not delivered a decisive opinion. But a later judgment showed to the court that this was a mistake; accordingly the court hastened to correct its error. In Fairfield's case it appeared that before the first decision in the Federal Court there was a state decision which was unknown to the judges, for which reason they did not follow it, but held adversely to it. And after that two other judgments were rendered to the same effect. So that when the case in 100 U. S. came to be decided, the error arising from the oversight was corrected. What the court did in those cases was what it does in all cases. If it is in any way betrayed into an error in stating the law in one case, it will correct it in another."

SUPPLEMENT.

The following is a vertabim re-print of a portion of the brief used in the Supreme Court of Nebraska, upon the hearing in Little vs. Giles, to which we invited attention in the outset, and to which, if the court are not already satisfied that the plaintiff in error is entitled to reversal upon the preceding arguments and authorities, we again respectfully urge shall be carefully considered.

"Since appellant's seem to rely chiefly upon the opinion of Mr. Justice Woods, in Giles vs. Little, 104 U. S., 291, we desire to invite the especial attention of this court to the first paragraph of the argument in that opinion, from which we quote the following: "Under the state of the science of

law as applicable to the construction of wills, it may well be doubted if any other source of enlightenment in the construction of a will is of as much assistance as the application of natural reason to the language of the instrument, under the light which may be thrown upon the intent of the testator by the extrinsic circumstances surrounding its execution, and connecting the parties and the property devised with the testator and the instrument itself."

Now let it be remembered that these "extrinsic circumstances," as they appear in this record, or at least the most significant of them, were not before the court in that case, the decision being of a general demurer to a petition in an action of ejectment, and then let us consider these circumstances in the application of "natural reason to the language of the instrument."

The testator, at the date of the execution of his will, shortly before his death, was the father of six living children, varying in age from six to nineteen years. These children, far from being robust, were of weakly constitutions, tainted with hereditary consumption, from which disease their early death was predicted by relatives and friends, and from which several of them did die soon after the death of their father, he also dying from the same disease. At the time of his death he owned no real property from which he derived or could derive any income, except his dwelling house, portions of which—although it was certainly not too large for the comfortable accommodation of a family of eight—he seems to have been compelled to rent to obtain means of subsistence, which he further eked out by selling occasionally a vacant lot, and by speculating on the state sales in such a manner as not to require the use of capital.

That this house of six or eight rooms was, or could have been, regarded as a source of permanent income while it remained the dwelling place of a woman and six children, the latter soon, if they lived, to become young men and women, we presume no one will seriously contend. That the house was an unfit place of habitation, especially for a family of weak and consumptive children, the evidence leaves no doubt upon our minds, and it was doubtless for this reason that the testator, in the fall previous to his death, anticipating his ability to raise money by further sales of his lots and lands, had begun the construction of a new dwelling on lands belonging to his wife, and situated southeast of town. At the date of his death, soon after the execution of the will, the testator's estate was found to include personal property of the value of $958. Of this amount, $443 consisted of wearing apparel, household furniture, and a hog and three cows, all of which, under a statute now, and then, in force—Sub. 1, Sec. 176, page 359, Compiled Statutes 1887—was assignable to the widow, "as well when she receives the provisions made for her in the will of her husband as when he dies intestate:" so that the total amount of personal estate bequeathed was $515. Out of this munificent sum the appellants would have us believe that the testator intended that his widow should feed, clothe and educate six children, and meet the annual charge for taxes on his real estate, and pay his debts. It is to be remembered that the testator had debts, or at least one debt, and that it was a considerable one, exceeding $2,000 in amount. Counsel attempt to brush this aside by a reference to "a mortgage on Wyoming lands." The "lands" were one lot—lot 7, in block 51, in the mythical town of Wyoming, in Otoe county, in this state. Upon foreclosure in the year of the testator's death,

and within a year from the execution of the will, this lot was appraised at $150, and sold for $101, leaving a deficiency judgment of $2,006, which was afterwards paid, presumably by the widow, out of the $515 personal property bequeathed her by the will. Probably the exhaustion of this $515 fund accounts for the fact that there is no proof of the payment of the following judgments against the testator, viz: Charles H. Wyatt, $700.50; George W. Hughes, $100.25; Thomas Horton, $87.05; and Hall & Barker, $167. It is said that the testator left a "state land contract" worth $400. How this fact tended to lighten the burdens cast upon Mrs. Dawson by her husband's death, we are unable to see. Certainly if she could not sell other real estate, she could not sell this, and the above mentioned drafts upon the $515 worth of personal estate bequeathed, put it out of her power to meet the annually accruing installments to the state, so as to save the contract from forfeiture.

The suggestion that the widow had a separate and several estate of her own, out of which the testator intended that she should support herself, bring up and educate his children, pay his debts, and keep down the tax charges upon his estate, is untenable for two reasons: First. No such intention is expressed in the will; the estate is not limited upon any such condition, nor upon any condition except that she should remain his widow. Second. Her estate, at most not more than one-fifth of his in value, was, like his "raw land," wholly unproductive of any income, and, while no obligation, legal or moral, rested upon her to discharge these obligations, so long as his estate remained unexhausted, it will not be presumed that he was so unregardful of his duty toward the mother of his children as to wish to bankrupt her for their support, in order that they

might inherit his own comparatively large estate undiminished. Yet, if appellant's contention is the true one, she must have voluntarily subjected her estate to these charges, or else guardians for the children must have been appointed, and a court of equity, as the universal guardian, must have seized upon the testator's estate and directed its sale, or so much of it as was necessary for defraying them and all the attendant costs, expenses and disbursements. To what extent unimproved lands, offered at public and forced sale, in a community of strangers, would have been sacrificed, and how rapidly by this means the estate would have been dissipated, the testator undoubtedly foresaw, and with commendable prudence, in the exercise of "natural reason," he chose to vest the power of disposition in his widow.

II.

We think the will contains apt words to express this intention. In respect to internal interpretation of the language of the will, the opinion of Mr. Justice Woods, above quoted, seems to us to be self-contradictory. The disposing clause of the will is: "To my beloved wife, Editha J. Dawson, I give and bequeath all my estate, real and personal, of which I may die seized, the same to remain and be hers with full power, right and authority to dispose of the same as to her shall seem meet and proper, so long as she shall remain my widow." "No man," says Mr. Justice Woods, "unversed in technical rules of construction, can, it seems to us, read this will without coming to this conclusion, *i. e.*, that the devise was of a life estate only; to hold otherwise would be to suppose that the testator, in drafting his will, was governed by abstruse rules of law in regard to the effect of his expressions, of which it is probable that he never heard, and had

not the slightest conception." If this is true, how does it happen that when, in a later part of the will, the testator writes the residuary clause in these words, "Upon the express condition that if she shall marry again, then it is my will that all the estate herein bequeathed, or whatever may remain, shall go to my surviving children, share and share alike," he is held to have used the phrase, "or whatever may remain," in the strictly technical and abstruse, or, as one may say, in the black-letter sense, of "a remnant of an estate in lands expectant upon a particular estate created together with the same at one time." How did the man who was so simple-minded and unlearned while writing the first part of his will as not to know that a devise of "all of the estate of which he should die seized" might be construed to mean his estate in fee simple of lands, become so learned and acute a few seconds later as to create by words, in common language synonymous with "residue," an estate technically in "remainder," the very definition of which, we hazard the guess, not one attorney in twenty practicing at this bar can correctly give? If the testator can be supposed to have suspected—which he probably did not—that the words "whatever may remain" could be construed to mean a technical "remainder," of which thing he had probably never heard, then he certainly may fairly be supposed to have known that "all his estate in lands of which he was seized" included his estates therein in fee-simple. In such a case he may be presumed to have apprehended that there may be a difference between devising lands by description or devising "all the lands of which he was seized," and devising "all the estate of which he was seized" in lands. The latter is what the testator did in this case, and it seems to us that whether he was learned or unlearned, simple or

shrewd, whether his language is to be taken in the popular or technical sense, it means the same thing, to-wit, he gave all he had. An unlearned man would certainly suppose that "all his estate and property, real and personal," means all his earthly rights and possessions; it could only remain for professional subtlety or judicial wisdom to raise a doubt.

The use of the words "estate" and "seized," coupled with the power of disposition, as in this will, have been frequently held to convey the fee, or the power to dispose of it, to the first taker, usually the widow, determinable at death or marriage. In fact, authority to the contrary can hardly be found outside the Federal reports. As illustrating the diversity of judicial opinion as to the true construction of the same words, in substantially the same relation, the case of Roseboom vs. Roseboom, 81 N. Y., 356, is valuable. The will in that case was almost identical with the one at bar: "I give and bequeath my beloved wife, Susan, one-third part of all my property, both real and personal, and to have the control of my farm so long as she remains my widow, and at the death of my wife, all my property, both real and personal, to be equally divided between my eight children." At the death of the widow it was contended that, as the will expressly provided for a division of all the testator's property upon the happening of that event, he must have intended that his widow should take only a life estate in the one-third devised to her. But the court held that she took a fee, remarking, however, that if the testator had qualified the residuary clause with the words "all my remaining property," there would have been left no occasion for controversy. The testator in the case at bar did qualify by use of the equivalent phrase, "or whatever may remain," but he did not thus remove the possibility of

solute estate in lands. But a devise *to a wife for life*, and after her decease she to give the same to whom she will, passes but an estate for life, with a power. *Yet if an express estate for life had not been devised to the wife, an estate in fee would have passed by the other words.* This is the distinction which prevails through the cases. When an *express estate for life is given*, and afterwards a power of disposition is added, then the devisee takes but a life estate with power of disposition, *and, if no disposition is made*, the reversion will go to the heirs of the devisor. But if there is no previous devise of a life estate, but a simple power of disposition is bestowed, then the devisee takes an absolute estate."

The court then cites Jackson vs. Robbins, 16 Johns., 387, "which appears to have been well considered, in which it was held to be an incontrovertible rule, that when an estate is given to a person, generally or indefinitely, with a power of disposition, it carries a fee, and the only exception to the rule is where the testator gives to the first taker an estate for life only by *express words*, and annexes to it a power of disposal." * * * * This distinction is carefully marked and settled in the books.

So in Cook vs. Walker, 15 Ga., 462, J. Lumpkin says: "We hold it to be an incontrovertible rule, then, that whenever an estate is given in Georgia, either by deed or will, to a person generally or indefinitely, with the unlimited power of disposition annexed, that it invariably invests the absolute fee in the first taker."

In Helmer vs. Shoemaker, 22 Wendell, N. Y., the court of errors, by Cowen, decided that, "when a testator devises all his real and personal estate to a devisee, giving

him the power of unqualified disposition of the property devised, the devisee takes a fee simple absolute in the real estate, although there be no words of limitation applicable to such a devise, and notwithstanding by a subsequent clause in the will a limitation over is created in favor of another person as to so much of the property given to the first devisee as may remain at the decease of the first taker."

Chancellor Walworth and Judge Cowen both sat in this case, and Judge Cowen, in speaking of the limitation over, says that, "At the utmost it would carry only so much of the estate as the devisee had not disposed of during his life." P. 139.

Jackson vs. Bull, 10 Johnson, 19.

"If the first devisee has the power by the terms of the will to dispose of the property he must be considered the absolute owner, and any limitation over is void for repugnancy."

Rona et al. vs. Mier et al., 47 Iowa, 607.

Flyn vs. Davis, 18 Ala., 132.

In Atwood vs. Marwood, 7 Jones L., 463, the devise was, "All my property to my beloved wife, during her natural life or widowhood, with power to dispose of the same by sale, will, or otherwise, at her discretion." Held, that she had the power to convey the real estate in fee simple. To the same effect are:

Bennesch vs. Clark, et al., 49 Md., 498.

Van Horn vs. Campbell, 100 N. Y., 278.

Canady vs. Jones, 19 S. C, 297.

South vs. South, 91 Ind., 221.

Jones vs. Bacon, 68 Me., 34.

Bond's Appeal, 31 Conn., 193.

In the case of Stowell vs. Hawkings, 59 Vermont, p. 496, the words of the will were: "I give to my beloved wife, Hepsibah H. Stowell, the residue and remainder of all my estate, both real and personal, for her benefit and support, to use and dispose of as she may think proper. If any of the estate should be left in my wife's possession at her death, it is my will that the same should be equally divided between eight of my brothers and sisters." *Held*, That Hepsibah took a fee that the remainder over was void,

* * * * * *

The slight force given to the provision or terms in the will, by the Supreme Court of the U. S., of "whatsoever may remain," or the application of such term, by a forced construction of the language, to the personal property only, is, to our mind, unwarranted, either in reason or in the light of the authorities.

The terms used apply alike to real and personal estate. Who shall say that they were intended by the testator to apply to one species of property rather than another?

They are most usually deemed by courts to be of controlling effect in a will.

They are not to be limited to the personal estate.

Henderson vs. Blackburn, 104 Ill., 98.

See Morrison vs. Simple, 6 Binn., 98, where Chief J. Tillingham says: "The giving of the real and personal property by the same words shows an intent to give the same interest in both, that is to say, an absolute interest."

And Judge Rogers, in Johnson vs. Morton, 16 Barr., 249, in a case similar to the one at bar, suggests: "If, therefore, they have but a life estate in his real property, they have no greater interest in his personal estate;" but this would be imputing an improbable, if not a most absurd intention to the testator, that he should give them life estates in live stock, consisting of sheep, chickens, cattle and other property of this evanescent kind.

See also:

Johnson vs. Johnson, 1 Mumf., 549, and

Steele vs. Thompson, 14 S. & R., 101.

In Church vs. Disbrow, 52 Penn. St., 219, the Supreme Court of Pennsylvania say:

1. That a devise of an estate, generally or indefinitely, with a power of disposition over it, carries a fee.

2. Any part remaining, implies that part of the devise might be so used as not to be in existence at her death, which is inconsistent with the notion that a life estate only was given.

The terms "whatever may remain," are held to imply an absolute power of disposition, in the following cases:

McKensie's Appeal, 41 Conn., 607.

Ramsdell vs. Ramsdell, 21 Maine, 288.
Harris vs. Knapp, 21 Pick., 416.
Homer vs. Shelton, 2 Metc., 202.
Lynde vs. Estabrook, 7 Alley, 68.
State of Conn. vs. Smith, 52 Conn., 562.
Redick vs. Cohoon, 4 Rand., 547.
Ide vs. Ide, 5 Mass., 500.

Many others might be added.

The case of Clark et al. vs. Middlesworth et al., 82 Ind., 240, is much stronger than the case at bar. There the testator devised to his wife, "all my property, real and personal, during her life, and at her death, if anything should remain, the same to be divided among my heirs at law." He left surviving, wife, children and grandchildren. The wife afterwards executed a deed of conveyance of the whole of the real estate, for an adequate price, with covenant that she was lawfully seized of the same in fee simple. Held, that she took an estate for life, with power to sell and convey the whole real estate in fee.

The court say: "The words, and at her death, should anything remain, are senseless and without meaning, unless the testator intended that the tenant for life might, prior to her death, dispose of the property devised to her for life. The words clearly show that he must have contemplated this at the time and therefore intended it." citing:

Paine vs. Barnes, 100 Mass., 470.
Andrews vs. Banks, 3 Allen, 313.

See also opinion of the court in South vs. South, 91, Ind., 222.

See also case of In re Will Burbank, 69 Iowa, 387.

See also in Markillie vs. Rogland, 77 Ill., 98, in which the testator provided that his wife "shall take at my decease my whole estate, real and personal, in form as it may be, and manage the same at discretion, and deal with the same as though she were sole owner." * * Such "entire control and disposal" to continue during her natural life, and at her death "whatever may remain" shall descend to my heirs. Held, That the wife took a fee simple.

Finally, the proofs show the condition of the family and his estates at the time of the death of the testator, the needs and requirements of the widow in raising the family and in supporting them, educating and clothing them. They were living together with her as a family. On reading the will in the light of the proofs, we think no one can say that an uncertain estate for widowhood would have sold at all or would have brought anything like a sufficient sum to have paid the debts or supported the family, or was intended to be all the husband meant to bestow on the wife. When this will was before the Supreme Court of the United States, they did not have the privilege of reading it in the light of the facts now before the court, all of which must be considered.

In the case of Kaufman vs. Breckinridge, 117 Ill., p. 315, the words of the will were: "I give and bequeath to my beloved wife, Martha Long, all my goods, estates and chattels, real, personal, and mixed, to have, hold and use the same so long as she remains my widow. Said goods

and estates, etc., to be disposed of and used agreeably to her direction and approval, and in such manner as she may deem most condusive to the welfare and comfortable subsistence of herself and our beloved children * * * ." Held, That the widow had the power to convey the fee, and that extrinsic evidence was proper to show the circumstances under which the will was made, as the state and condition of his property, of his family and the like.

III.

The foregoing may suffice to show the almost unbroken array of authority in the state courts, but we desire to go a step further, and show that whenever the case of Smith vs. Bell, 6 Peters, 68, upon authority of which Mr. Justice Wood's decision is based, has been brought to the attention of the state courts, it has been expressly dissented from. Brant vs. Virginia Coal & Iron Company is not in point, because the estate in the first taker was limited to one for life by express words.

Regarding the original case of Smith vs. Bell, we find it set down as one of the overruled cases by Bigelow, in his book of overruled cases.

Looking further, we find that Justice Parsons, in Flynn vs. Davis, et al., 18 Ala., 132, regards it as an exception to the general rule of law applicable to the construction of such provisions.

The court, in Stewart vs. Walker, 72 Maine, 146, regards it as "a case differing somewhat from many of the authorities."

A. C. Freeman. in his notes to the American Decisions, after citing many cases, says of Smith vs. Bell: "The doctrine of this case is contrary to the authorities generally." Vol. 39, page 319.

Judge Hoar says, in Gifford and others vs. Choate, 100 Mass., p. 346: "A somewhat different rule is perhaps to be found in Smith vs. Bell. 6 Pet., 68, where a legacy to a wife, to and for her own use and benefit and disposal absolute, the remainder of said estate, after her decease, to be to the use of testator's son, was held to create a life estate only in the wife, with a vested remainder in the son. The authority of the decision is somewhat impaired by the circumstance that no counsel were heard on behalf of the party against whom it was made, and the attention of the court does not seem to have been drawn to the authorities in favor of the opposite conclusion."

See also:

Lewis vs. Farmer, 46 Conn., 454, and

Campbell vs. Beaumont, 91 N. Y., 468.

In Canedy vs. Jones, 19 S. C., 297, Smith vs. Bell is declared not to be authoritative, while Brant vs. Virginia Coal Company, cited by the Supreme Court, is conceded to be correctly decided, because "the wife was given a life estate in express terms."

See also comments on the case of Little vs. Giles, in the case of Henderson vs. Blackburn, 104 Illinois, at page 232, where it is explained by limiting the term, "or whatever remains," as applicable only to the personal property devised. Here is the last echo of the error sounded in the case of Smith vs. Bell.

IV.

The limitation over in favor of the children—according to Mr. Justice Wood's opinion—was of what? The will says of "all the estate herein bequeathed." In order to ascertain what was limited over, then, it is necessary to inquire what estate was bequeathed. If it was only a life estate, terminable by marriage, how could a remainder be left after carving it out? If the estate bequeathed was a conditional or limited fee, then, and then only, could something be left for the limitation over to operate upon? We hope counsel for appellants will not, in argument, overlook the fact that what was contingently given to the children was some remnant or remainder of an "estate," and not only so, but of the "estate devised" to the widow. And we hope they will show to the court how, if the "estate herein bequeathed" was not a fee, anything could be left of it to go to the children after the death or marriage of the first taker.

V.

The statute of wills in force in this state at the time of the execution of the will in controversy and still in force, is misquoted by Mr. Justice Woods, presumably because it was misquoted in appellant's brief in that case. This statute is as follows: "Every devise of land in any will hereafter made shall be construed to convey all the estate of the devisor therein which he could lawfully devise, unless it shall clearly appear by the will that the devisor intended to convey a less estate."

Chapter on Decendents, Compiled Stat., par. 124.

As quoted, the word "clearly" is left out, so that the statute is made to appear as if meaning nothing at all, for of course a will would not be held to convey one estate, if it purported on its face to convey another and different estate, and the statute was not enacted to declare so self-evident a proposition. What the statute was enacted to declare was that the whole estate should be presumed to be conveyed, unless a contrary intent should be clearly expressed; that is to say, expressed by negative words or something equivalent thereto. Mr. Justice Woods, however, suggests that the statute supports the view of one party equally with that of the other, because he says that in opinion of the appellees the whole estate went to the widow, while according to the appellants the whole estate also was conveyed, part going to the widow and the residue to the remaindermen, the children.

We submit that this is a subtlety which deals with words only, and not with things. The persons to whom the residue was devised after the determination of the widow's estate were the issue and heirs at law of the testator, and the will provided that those of them who should survive the estate of the widow should take share and share alike, and the issue of those deceased should take the share or shares of its or their parents. This is precisely the method of distribution prescribed by our statute of descents, then and now in force. Hence no will and no provision in a will was necessary in order to vest in the testator's descendants the identical estate which Mr. Justice Woods and the appellants insist was vested in them by this will, and the legal effect of the instrument would have been the same as it is now contended to be, if fully half the verbiage thereof had been omitted.

If this interpretation is correct, the following, which is quoted therefrom, is all that was necessary for effecting the object which the testator did effect, viz: "To my beloved wife, Editha J. Dawson, I give and bequeath all my estate, real and personal, of which I may die seized, the same to be and remain hers, with full power, right, and authority to dispose of the same as to her shall seem meet and proper, so long as she shall remain my widow." This, unless the use of the word "estate" would, as most authorities hold, have determined otherwise, would have vested her with a conditional estate for life, and left the reversion in the testator's heirs, and this reversion would have been identical in every particular with the "remainder" which appellants contend was created by the will.

This seems conclusive upon the question of the intent of the testator. The important fact that he did not attempt to change the method of distribution of the residue, which he contemplated might be left after the termination of the life estate, from that prescribed by the statute of descents, shows very clearly that he regarded this residue as quite another and different thing from a reversionary interest in all the property of which he died seized.

Whether the testator was learned or unlearned—whether he made use of "natural reason" or acquired subtleties—he must have known, if he knew anything, that if he gave his widow a widowhood estate only, then, upon the termination of that estate, the fee would go to his surviving children share and share alike, and to the issue of those deceased by right of representation, and hence he must have known that the greater part of his will was useless lumber, unless his object was not to re-enact the statute, but to dispose of the

residue, to use his own words, "whatever should remain" of of his property when his widow should cease to be such.

In support of our construction of this statute we cite the following decisions from a state from which the statute was borrowed, and where it is still in force:

Jones vs. Jones, 25 Mich., 401.
Weir vs. Michigan Stove Co., 44 Mich., 506.
Chamber vs. Shaw, 52 Mich., 18.

FINALLY.

Since writing the foregoing in answer to the brief for appellants, served by Judge Mason, we have been served with another, prepared by Mr. Woolworth.

The only additional argument contained in the latter is this: Because the testator's children inherited the constitutional taint of consumption, and because, on account thereof, the testator may be reasonably supposed to have expected that they would die during the existence of the conditional life estate of his widow, an expectation which was verified as to four of them, therefore it is to be inferred that he intended to create in their favor an estate in remainder to ripen into possession after their death. As an exhibition of logic, this, to use a sporting phrase, "beats the record." We should suppose, rather, that in such case, the testator would have provided his widow with power to realize upon his estate and employ the proceeds for the comfort of his children, and, if possible, for prolonging their lives. A remainder over in favor of a person after it is anticipated

that he will be dead, cannot, in our opinion, be regarded as an especial testimony of affection and regard for the remainderman. If all the children of Jacob Dawson had died during the widowhood of Mrs. Dawson, leaving no issue, as it is agreed between appellants and appellees the testator may well be presumed to have expected they would do, then, if appellants' construction of the will is correct, the remainder in fee would have gone to the collateral heirs of the testator. Is there any presumption that he would have preferred this to having the proceeds, or "whatever should remain" thereof, go to the issue of his widow by a second husband? Or, indeed, is it certain that he would not have preferred that the wife of his youth, and the mother of his children, should, after the death of the latter, enjoy it herself, even although it should be in company with that nameless horror, a second husband? And this leads us to make another inquiry which we inadvertently omitted in the foregoing brief, which is this: Why, if the estate which the testator intended to create in his children was a definite one, to-wit, a remainder in fee in all his lands, did he not use definite language? Why did he not say, "Upon the death or marriage of my said wife I devise the remainder of my real estate to my children," etc.? Why did he say, "Whatever may remain"? Does not the use of the word "whatever," of itself, show that the testator was uncertain as to how much or whether anything would be left for the limitation over to operate upon. It is synonymous, according to Mr. Webster, with "whatever may be." But according to appellant's construction, there was no uncertainty about it. What was limited over was as certain as an estate in fee conveyed by a warranty deed: in fact it was the same thing, to-wit, a fee in all his lands after carv-

ing out a conditional estate for life. Then why, in the names of all his consumptive children, did he not say so? We can think of only one reason, and that is, that he did not so intend.

CONCLUSION.

If the foregoing discussion as to the testator's intent as gathered from the language used in the light of "extrinsic circumstances" is valueless for every other purpose, it seems to us to furnish convincing reasons why, in cases like the present, the construction put upon the instrument by the state and local courts should prevail over that announced by this court.

N S. HARWOOD,
JOHN H. AMES,
Attorneys for Plaintiff in Error.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1893.

ARTEMAS ROBERTS,
Plaintiff in Error,

vs.

WALTER F. LEWIS,
Defendant in Error.

ON CERTIFICATE OF QUESTIONS FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

J. M. WOOLWORTH,
L. C. BURR,
Of Counsel for Defendant in Error.

LINCOLN PAPER HOUSE, LINCOLN, NEB.

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J. M. WOOLWORTH, L. C. BURR, *Of Counsel for Defendant in Error.*

BRIEF OF DEFENDANT IN ERROR.

This suit was originally brought in the circuit court of the United States for the district of Nebraska, and judgment was rendered against the plaintiff in error and in favor of defendant in error; and the case was taken to this honorable court by the plaintiff in error. It was reversed upon a mere technicality, see Roberts vs. Lewis, 144 U. S., page 653. The action was again tried in the circuit court of the United States and again a judgment was rendered in favor of the defendant in error and against the plaintiff in error, and the plaintiff in error took the case by proper proceedings to the United States circuit court of appeals, eighth circuit, and that court upon the 16th day of October, 1893,

certified the case to this honorable court and desires that the following questions or propositions of law arising in this case shall be determined.

"*First*—In determining the nature of the estate that became vested in said Editha J. Dawson under said will of her deceased husband, Jacob Dawson, in and to lands situated in the state of Nebraska, wherein said Jacob Dawson died seized and possessed, should the circuit court of appeals be governed by the decision of the United States supreme court in Giles vs. Little, 104 U. S., pages 291–300, or by the subsequent decisions of the supreme court of the state of Nebraska in Giles vs. Little, 25 Neb., pages 313–344?

"*Second*—Did the aforesaid will of Jacob Dawson vest his widow with such an estate in lands whereof the testator died seized, situated in the state of Nebraska, that during her widowhood she could convey to third parties an estate in fee simple therein?

"*Third*—Should the construction of the will of Jacob Dawson, deceased, which was adopted by the supreme court of the United States in Giles vs. Little, 104 U. S., 291, be adhered to by the United States circuit court of Appeals for the eighth circuit, in determining the right of Walter F. Lewis in and to the property heretofore described, in view of the fact that said Walter F. Lewis purchased said property subsequent to the promulgation of said decision in Giles vs. Little and prior to the decision of the supreme court of the state of Nebraska in the case of Little vs. Giles, 25 Neb., 313?"

As we understand it the only questions or propositions

of law that the circuit court of appeals desire this court to instruct them upon are the three propositions respectively numbered above, and we do not like to discuss any other propositions unless required to do so by the brief of plaintiff in error.

The plaintiff in error, it seems to us, has gone outside of the questions certified by the court of appeals and has taken for his argument a suggestion of Mr. Justice Gray in the former opinion in this case, and by so doing he abandons all his arguments advanced to the court when that opinion was rendered so far as is applicable here.

FIRST POINT.

Jacob Dawson died seized of the premises in question, leaving a will by which he devised all his estates, as set forth in the certificate. This will was before this court for construction at its October term, 1881, in the case of Giles vs. Little, 104 U. S., 291. It was there unanimously and upon careful consideration held that the widow took an estate for life, determinable upon her marriage, with remainder in fee to the children of the testator. Mrs. Dawson having in December, 1879, married again, the children of the testator became at that time seized of the premises in fee. In May, 1887, the plaintiff below acquired the title of the children.

This action was brought in the circuit court for Nebraska, on the 11th of June, 1887. At its January term, 1889, in a case then before it, the supreme court of the state of Nebraska rendered a judgment construing the same will as

giving the widow the fee and power to convey the same before her remarriage.

Upon these facts the court should adhere to the federal judgment and not yield to that of the state court above mentioned.

The general rule is that the laws of the several states shall be regarded as rules of decision in the federal courts in cases to which they apply, except where the constitution, treaties, or statutes of the United States otherwise require or provide. In trials at common law this is prescribed by statute. In suits in equity and admiralty, it has been established by a long course of decisions. It is of equal force and application in all the jurisdictions of the federal courts.

But stated in these general terms, the rule leaves many interesting questions. One, and a radical one, is what are the laws of the several states which shall be rules of decision in the federal courts. When that is ascertained, nothing remains for this court but to apply it to any case before it for decision. The constitution and the statutes of a state are laws within the rule; so are the customs of the people, and a long, uniform course of action on the part of the legislative and executive departments of the government. But it happens every day that men, well learned and honest men, differ about the meaning of constitutional and statutory provisions. It becomes necessary to submit these differences to the courts, and their decisions are evidences of the laws. Men resort to them to learn the meaning of the constitutional and statutory phrases, just as they resort to other sources of information to learn what are the customs of the

people and the policy of the legislative and the administrative officers. We go to the judicial decisions for the interpretation of the written provisions, just as we do to the marts to learn the customs of commerce; and in both cases for the same purpose. That purpose is always to ascertain what the laws of the state are.

Almost always questions of local law arise in the local courts before they do in the national courts. This is natural; and when the decisions in the former have been made in such wise as to be definitive, it is the duty of the latter to accept them and apply the law as expounded by them to proper cases; and this is because the law of the state is as its courts have declared. But sometimes judges of the state courts differ in their views of the law; as many of them may hold one opinion as hold the other opinion. The particular case before them for judgment may be decided one way or the other, but the diversity of opinion leaves the principle where it was before the dispute arose. Of course in such conditions the federal courts are as free to act as if the question was first raised in them. So, too, sometimes the state courts, after holding the law to be one way in a line of decisions, longer or shorter, changes its opinion and holds it to be another way. This sets the matter at large and leaves this court to ascertain for itself what the law is, or to critically examine the local decisions to ascertain what they settle.

When for any such reason the state courts have not spoken a decisive language, or when, as sometimes happens, because the question has not been presented to them they have not spoken at all, and the federal courts are called by

a case before them to administer the local law, their duty is to ascertain what it is for themselves. Their duty is just as imperative and their competency is just the same as those of the state courts. Their decisions on questions of local law are as binding, not only upon the parties to the case in which they are rendered, but upon all other citizens, as those of the local courts.

Some have thought there is a degree of indefiniteness in the doctrine of the federal supreme court on the subject. Possibly some inconsistency may be found in its different expressions. But the cases do not show that this court has ever yielded its judgment to that of a state court when it has deliberately spoken first. The question always being what is the local law, this court always, in obedience to the spirit of the general rule, accepts the exposition of it by the local court, if such exposition has been given. But if this court is, by the exigencies of an orderly litigation, first called on to determine the local law and it does so, it does not yield its judgment to that of a local court afterwards pronounced, save only when, as in all other cases, it becomes satisfied upon its own independent examination that it has fallen into error.

That statement is borne out by the cases. Grover vs. Slaughter., 15 Peters., 449 (1841), and Rowan vs. Runnels 5 How., 134 (1847), should for our present purpose be considered together. Each was an action on a promissory note, given in Mississippi upon a sale of slaves, imported in 1835 and 1836 into that state, as merchandises for sale generally to any one who might wish to purchase.

In 1832 the constitution of the state was adopted contain-

ing this provision: "The introduction of slaves into this state as merchandise or for sale shall be prohibited from and after the first day of May, 1833," with a proviso not material here. It was contended that the notes were illegal and void under this law. On the other hand it was contended that the inhibition could not take effect without legislative action. The question was the same in the two cases, although presented in different ways, which is a circumstance not of consequence.

The first case was very elaborately argued by the most eminent counsel. Mr. Justice Thompson delivered the opinion of the court. The very first subject he deals with is "the argument" made "by way of preliminary objection to an examination of the construction of the constitution" by this court, "that this article has received a judicial interpretation in the courts of Mississippi, which, according to the doctrine of this court with respect to state decisions upon their own laws and constitution, will control the judgment of this court upon this question." He then examines the case decided by the state supreme court, which was cited in the support of this contention, and finds that there was such diversity of opinion among the judges as to justify this court "in considering that the construction of the constitution in that state is not so fixed and settled as to preclude us from regarding it an open question." He then enters upon an original examination of it, and reaches the conclusion that the prohibition did not become operative because there was no legislative action carrying it into effect. Under this ruling the note was valid and judgment thereon was for the holder against the maker.

After that decision in the supreme court, the same question came before the supreme court of the state, which held that the article of the constitution was of its own vigor in force, and a note for slaves imported after the day fixed in the article was illegal and void, although there was no legislation on the subject. After that Rowan vs. Runnels came to the supreme from the circuit court of Mississippi, and the state decision was strongly pressed upon that court as the end of the contention. Mr. Chief Justice Taney delivered the opinion of the court, Mr. Justice Daniels alone dissenting. After stating the opinion in Grover vs. Slaughter, the Chief Justice says: "It now appears, however, that the question has since been brought before the courts of the state, and it has been settled by its highest tribunals that the clause in the constitution above referred to did of itself, and without any legislative enactment, prohibit the introduction of slaves as merchandise and for sale, and render all contracts for the sale of such slaves made after May 1, 1833, illegal and void. And it is argued that inasmuch as this court adopts the construction given by the state courts to their own constitution and laws, we ought to follow the decisions in Mississippi, and declare the case before us to be void, notwithstanding the case of Grover vs. Slaughter.

"But we are not aware of any decision in this court which presses the rule so far, or that would justify this court in declaring contracts to be void upon this ground, which, upon the fullest consideration, it has so recently held to be good."

The learned judge returns to Grover vs. Slaughter and

states with care the reasoning therein, and continues by stating the rule that this court follows the state courts in their construction of their constitution and laws, and concludes thus: "But we ought not to give them a retroactive effect and allow them to render invalid contracts entered into with citizens of other states, which, in the judgment of this court, were lawfully made. For if such a rule were adopted and the comity due to state decisions pushed to that extent, it is evident that the provision in the constitution of the United States, which secures to citizens of another state the right to sue in the courts of the United States, might become utterly useless and nugatory. We are of the opinion, therefore, that the decision in the case of Grover vs. Slaughter must rule this case."

In Pease vs. Peck, 18 How., 595, Mr. Justice Grier delivering the opinion of the court, discussed somewhat at large this question, and at page 599 said: "But when this court has first decided a question arising under state laws, we do not feel bound to surrender our convictions, on account of a contrary subsequent decision of a state court, as in the case of Rowan vs. Runnels, 5 How., 139."

Morgan vs. Curtinius, 20 How., 1, was ejectment brought in the Illinois circuit. The plaintiff claimed under a patent issued to Bogardus in 1838. The defendant claimed under a deed made by Bogardus in 1834, purporting to "grant, sell, and convey" all of the interest of the latter, and also proved that the defendant paid Bogardus the consideration and took out the patent in the latter's name. The plaintiff moved to exclude all of the defendant's evidence, which motion was overruled, and this is the error complained of. It was con-

tended that the deed was simply a quit-claim which did not estop the plaintiff to allege the after-acquired title under the patent. There was a statute to the effect that a grantor, by deed purporting to convey a fee, not having the legal title at the time but afterwards acquiring it, shall be taken to hold the same in trust for his grantee, and his deed be taken to be as valid as if he had the legal title when he made the same.

The case was tried at the circuit on the 8th of June, 1849. In 1845 the supreme court of the state in a case then before it construed the statute and held that under it the after-acquired title inured to the grantee. Mr. Justice Grier delivered the opinion of the court, and, after stating the facts as above briefly recounted, said at this point, "This construction of the statute was therefore a settled rule of property at the time of the decision of this case in the court below, which that court was bound to follow; and having so decided there was certainly no error in the decision at the time it was made."

But in 1853 another case came before the state court in which the same conveyance and the same statute were in question as in the former and received a contrary construction. The learned judge then says: "If the judgment of the circuit court in this case had been given since the last decision of the supreme court of Illinois, this court might have been compelled to decide whether they considered themselves bound to follow the last decision of that court or were at liberty to choose between them. But, however the latter decision may have a retroactive effect upon the title held under the deed in question, it cannot have that effect

upon decisions of the circuit court, and make that erroneous which was not so when the judgment of that court was given."

The case which must always be considered as concluding this question is Burgess vs. Seligman, 107 U. S., 20. It has been cited with approval in every case which has since been before the federal supreme court and in which, in any of its phases, the question has been presented. The opinion delivered by Mr. Justice Bradley was the unanimous judgment of the court. That great judge brought his best powers to the subject. His examination of the decisions was exhaustive as is shown by the citation, in the margin, of almost every previous case; his discrimination was characteristic, and his expressions were as exact and pregnant and strong as in any of his judicial writings.

The case was upon a statute of Missouri, providing that stockholders of a company at its dissolution should be liable for its debts, except executors, etc., and holders of the stock as collateral security. A railroad company of that state was dissolved, leaving unpaid debts. The Seligmans held certain of its stock, and were entered on its registry as holders with a memorandum "in escrow." They took it under a contract with the company, stating that the stock was to remain in their hands for at least a year. They were to buy 2,000 tons of iron for the company's railroad, and to advance $200,000 at seven per cent interest. The entire issue of the company's first mortgage bonds was also deposited with them upon certain specified terms. Holding the stock in this way, they were charged by the plaintiff, a judgment-creditor of the company, as holders of the stock at the time

of its dissolution. This was the question in the case. The circuit court held that they were not liable, and dismissed the action. Pending a writ of error from the supreme court, the supreme court of Missouri delivered two judgments adversely to that of the circuit court; and to the views expressed by the learned justice in his examination of the facts. He states that one of them seems to have been very fully and carefully considered and was substantially followed and confirmed by the other.

Upon the point now under discussion the opinion is familiar to the court and need not be quoted at length. The explication of it concludes with these words: "In the present case, as already observed, when the transaction in question took place and when the decision of the circuit court was rendered, not only was there no settled construction of the statute on the point under consideration, but the Missouri cases referred to arose upon the identical transactions upon which the circuit court was called upon and which we are now called upon to consider. It can hardly be contended that the federal court was to wait for the state courts to decide the merits of the controversy and then simply register their decision; or that the circuit court should be reversed merely because the state court has since adopted a different view. If we could see fair and reasonable grounds to acquiesce in that view we should gladly do so; but in the exercise of that independent judgment which it is our duty to apply to the case, we are enforced to a different conclusion.

"Pease vs. Peck, 18 How., 595, and Morgan vs. Curtinius, 20 Id., 1, in which the opinions of the court were delivered by Mr. Justice Grier, are precisely in point."

It would serve no useful purpose to cite other cases to the same effect, or to seek to support by any reasoning what may be now considered one of the institutes of the law. There are cases which are sometimes cited as holding another doctrine, but an examination of their facts will show that they are entirely consistent with the judgments cited above.

The controversy in the case of Williamson vs. Suydam was before the federal court several times, and an account of it will be useful. In 1802 Mary Clarke died seized of the lands in dispute, leaving a will devising the same to Benjamin Moore and his wife, who was the daughter of the testatrix, and Mrs. Maunsell in trust to receive the rents and pay them to Thomas B. Clarke, a grandson of the testatrix, during his life time, and at his death to his issue then living in fee; and if he died without issue, then to Clement C. Moore in fee. In 1814 the legislature of New York by an act discharged the trustees, on account of their inability to act from infirmity of health and other causes, and empowered the court of chancery to appoint others in their places, who should divide the land into twe equal parts, one of which they should hold upon the trusts declared in the will, and to sell the other and invest the proceeds, holding the principal for the same uses and paying the interest to Thomas B. Clarke. This measure proving ineffectual to the purposes for which that act was passed, in 1815 another was enacted authorizing him to act as trustee and providing that no sale by him should be effectual without the Chancellor's approval. Afterwards, in that year, Chancellor Kent authorized Clarke to sell the eastern moiety. In 1816 another act was passed authorizing Clarke,

under the Chancellor's order, to mortgage or sell the southern moiety, applying the proceeds to the purposes required by the Chancellor under the former acts. In 1817 the Chancellor made an order accordingly authorizing Clarke to convey any part of the southern moiety in satisfaction of debts, upon a valuation to be made as therein provided. In 1818 Clarke conveyed the premises to McIntyre, under whom Suydam held. During this time Clarke had infant children. The legislation and orders mentioned were obtained at his instance with the consent of all concerned except these infants. In 1826 Clarke died leaving these children. They sought to recover these premises, claiming among other things that the act was unconstitutional, and the Chancellor's orders were void for that reason, and because the orders were unauthorized by these acts. This controversy was first raised in the state courts. The action was ejectment. The lessor of the plaintiff, Moses Field, claimed upon a mortgage made by Clarke, and a decree of foreclosure sale and master's deed; the defendant claimed under a lease made by the original trustees. The validity of the acts of the legislature and the orders of the Chancellor was thus drawn in question, and the judgment was for the plaintiff. The case was then taken to the court of errors and is reported under the name of Sinclair vs. Johnson in 8 Cowen, 543. The court declined to express an opinion upon the validity of the legislation and the judicial proceedings, deciding the case on other grounds. This was in December, 1826.

The next case was Clarke vs. VanSurlay, 15 Wend., 439 (1836). This was also an ejectment brought by one of the children of Thomas B. Clarke. The defendant claimed under the latter, acting under the acts and orders above

mentioned. The supreme court held the acts constitutional and valid, and that the children could not question the validity of the Chancellor's orders in ejectment on the ground of excess of authority; and that they not being void the remedy was in equity or a court of review. The case was then carried to the court of errors where it is reported under the style of Cochran vs. VanSurlay in 20 Wend., 566 (1838), the original plaintiff having married Cochran. Chancellor Walworth delivered an opinion in favor of affirmance, and Senator Verplanck against the same. Upon the vote seven voted to reverse and twelve to affirm the judgment.

An action in ejectment was then brought in the New York circuit by Mrs. Williamson, one of the children of Thomas B. Clarke against Barry who claimed under the legislation and orders and proceedings above mentioned and Clarke's action thereunder. The judges were divided in opinion, and the case came to the supreme court on certificate made in 1846. Because of the difference between the members of the court of errors, that court did not think itself concluded by opinion of the latter, examined the question as an original one, and found that the orders of the Chancellor were without jurisdiction and that what was done under them was void. The opinion of the court was delivered by Mr. Justice Wayne, in the course of which he said that Judge Bronson delivering the opinion of the supreme court of the state in 15 Wend. said that the acts of the legislature did not give the Chancellor power to make the order; and that this may be gathered from the opinion of Chancellor Walworth in the court of error in 20 Wend., and is intimated by Senator Verplanck as his strong impres-

sion. And then the learned justice states a point of difference between this court and the state court and says, "Our conclusion, however, contrary to theirs, will be put upon grounds not suggested when they acted upon this case." The state court had held that a decree in chancery could not be looked into in a collateral way for the purpose of setting aside rights growing out of it. Admitting the rule, it was held that the jurisdiction of any court exercising authority over a subject may be inquired into in every other court.

Afterwards an action was brought in the superior court of New York, presenting the same questions, and was carried to the court of appeals, 14 N. Y., 423 (1856). The court speaking by Denio, C. J., reviewed the judgments reported in 15 Wend. and 20 Wend. and found that they settled the rule and refused to follow the judgment of the federal court.

The case reported in 8 How. went back for a new trial, which resulted in a judgment for the plaintiff. It was again brought to the supreme court, and is reported under the title of Suydam vs. Williams, 24 How., 427 (1860). Mr. Justice Campbell delivered the opinion. He showed that the state court held that the rule was settled by the judgments reported in 15 and 20 Wend., and it was bound to follow them instead of that of this court. Because the state court had thus settled the question, he held that under the circumstances this court was bound to follow it.

The case came there again and is reported in 6 Wall, but what was then ruled is not material here.

Fairfield vs. The County of Gallatin, 100 U. S., 47, was an action on county bonds brought at the Illinois circuit. The bonds were issued in aid of a railroad. The county was authorized by the legislature to donate money for that purpose, and certain officers were empowered to issue bonds therefor, after an affirmative vote of the people on the proposition to that effect. An election was held accordingly and resulted affirmatively. The bonds were issued to the railroad company on the 6th or 8th of October, 1870. The defense was that under the constitution of Illinois, which came into force on the 2d day of July of the same year, counties were forbidden to issue bonds for that purpose, except where the same had been authorized by existing laws by a vote of the people. In 1875, four years before this case was submitted the supreme court, the same question was presented to it, and it was held that bonds could not lawfully be issued after July 2, 1870, although they had been authorized by a prior statute and by a vote of the people taken before that day. That court was not at that time advised of a judgment rendered by the supreme court of Illinois, a year before, to the contrary effect. Since then two cases to the same effect have been determined by the state in the same way, and several legislative acts since passed show that the same view has been held by the legislature. The question was whether the supreme court would adhere to its former decision rendered in ignorance of the ruling of the state court or defer to the opinion of the latter.

Mr. Justice Strong delivered the opinion of the court, in the course of it he said: "We are not constrained to refuse following the decision of the state court in order to save the

rights on the faith of our own ruling." He then traces the course of opinion in the case of Grover vs. Slaughter, and points out that that case was ruled as it was in order to save contracts made before the adverse decisions of the state court, while in the case before him to adhere to its judgment this court would strike them down.

In each of these controversies the federal court yielded its first judgment, because when it was pronounced there were decisions of the state court to which their due effect had not been given. In the Williamson vs. Suydam case the court thought the courts of New York had not delivered a decisive opinion. But a later judgment showed to the court that this was a mistake; accordingly the court hastened to correct its error. In Fairfield's case it appeared that before the first decision in the federal court there was a state decision which was unknown to the judges, for which reason they did not follow it, but held adversely to it, and after that two other judgments were rendered to the same effect; so that when the case in 100 U. S. came to be decided, the error arising from the oversight was corrected. What the court did in those cases was what it does in all cases. If it is in any way betrayed into an error in stating the law in one case, it will correct it in another.

The learned counsel for the plaintiff in error cites Bucher vs. The Cheshire R. R. Co., 125 U. S., 555. In that case, however, it appears that the state court was the first to speak. It did so not only in a series of cases in which a uniform language was held, but in a case between the same parties upon precisely the same subject matter. The judgment did not involve the question here for decision.

The application of the doctrine of the federal court that, having first examined for itself and decided a question of local law, it will not surrender its independent judgment to a state court which afterwards holds another opinion for that reason alone, is very easy here. In 1881 the federal court construed this will. Afterwards, in 1889, the state court for the first time had the same will before it and gave it another construction. Nor was this all. In May, 1887, this plaintiff purchased these premises most undoubtedly relying on the opinion delivered in the federal supreme court.

And at this point we are met by another consideration of great consequence. In a long series of cases of various circumstances, this court, in a jealous care of rights derived from contracts, has uniformly held that if the state courts have held a certain view of the law upon which contracts have been made and rights have been acquired, and afterwards they have changed their decisions, they will not be followed in the federal courts, in cases to enforce those contracts, but the law of the state at the time those rights were acquired will be rigidly applied.

Mercer vs. Hackett, 1 Wall, 83.
Gelpcke vs. Dubuque, Id., 175.
Havemeyer vs. Iowa County, 3 Wall., 294.
Thomas vs. Lee County, Id., 327.
Mitchell vs. Burlington, Id., 270.
Lee County vs. Rogers, 7 Wall., 181.
City vs. Lamson, 9 Wall., 477.
Olcott vs. The Supervisors, 16 Wall., 678.
Douglass vs. The County of Pike, 101 U. S., 677.

Thompson vs. Perine, 103 U. S., 806.
—SC.— 106 U. S., 589.
Pleasant Township vs. Ætna Ins. Co., 138 U. S., 67.
Clark vs. Rives, 139 U. S., 96.

To be sure, this case is not exactly like those cited. When this plaintiff bought these premises, there was no state decision, but the principle is the same. At that time there was a decision of this court in favor of the validity of the title he was buying; upon that he had a right to rely, and this court owes it to itself as well as to him to protect him.

There is another reason for this court adhering to its opinion announced in 1881, instead of yielding to that of the state court announced in 1889. That reason is that the law involved in those cases is not within the meaning of the rule, that, in the federal courts, the laws of the several states are rules of decision. During all the period of the long course of decisions, in which that principle has been declared and followed, it has been held that there are laws of force in the states, upon which this court has not only an independent but entirely free judgment. Questions of commercial law, as in the case of promissory notes, Swift vs. Tyson, 1 Peters, 1; and policies of insurance, Carpenter vs. Providence Insurance Co., 16 Peters, 495, 511; and of the construction of deed, Foxcraft vs. Mallett, 4 How., 353, 379; and of private rights which are to be determined on common law principles, Chicago vs. Robbins, 2 Black, 418, 428; and rights of common carriers, Myrick vs. Michigan R. Co., 107 U. S., 102, and many other cases. Boyce vs.

Tabb, 18 Wall., 546, Hough vs. Railroad Co., 100 U. S., 226, are not within the rule. To this class belong also cases of the construction of wills.

Lane vs. Vick, 3 How., 464, was one of this class. A testator devised to his wife all his personalty at her disposal during her life, and also for her life a tract of land on which he resided, or certain other tracts as she should elect, reserving two hundred acres to be divided into town lots by the executors at their discretion. He also gave to each of his daughters one equal proportion of his personal estate with his wife and sons, and also of his real estate not chosen by his wife. He then provided that the town lots laid off and to be laid off on the 200 acres, should be sold to pay debts in preference to other property. The wife died shortly after the testator. The question was whether, upon a proper construction of this will, the daughters took an interest in these lots. The supreme court of Mississippi, where the testator lived and the lands were situated, held that they did not, and it was urged that the federal court was bound by that decison.

Mr Justice McLean delivered the opinion of the court and on this subject said: "It is insisted that the construction of this will has been conclusively settled by the supreme court of Mississippi in the case of Vick vs. The Mayor and Aldermen of Vicksburg, 1 How. (Miss.), 379. * * * Where, as in the case of Jackson vs. Chew, 12 Wheat., 167, the construction of a will has been settled by the highest courts of the state, and had long been acquiesced in as a rule of property, this court would follow it because it had become a rule of property. The construc-

tion of a statute by the supreme court of a state is followed without reference to the interests it may affect or the parties to the suit in which its construction is involved. But the mere construction of a will by a state court does not, as the construction of a statute of a state, constitute a rule of decision for the courts of the United States. In the case of Swift vs. Tyson, 16 Peters, 1, the effect of the 34th section of the Judiciary Act of 1789 and the construction of instruments by state courts are considered with greater precision than is found in some of the preceding decisions on the same subject."

It cannot be said that the decision of the supreme court of Nebraska established a rule of property which this court must enforce in this case. The rule of property was established here in 1881 and acting upon it this plaintiff bought the premises in question. Not until 1889, eight years afterwards, did any court hold otherwise.

But it may be suggested that the supreme court of the state reached its conclusion as to the meaning of this will adversely to that of this court, by the application of two statutes, and that for that reason its judgment must rule this case. It would be sufficient to answer that this court decided what was the proper application of the statute secondly mentioned by the state court.

Mr. Justice Woods, delivering the opinion of the court in Giles vs. Little, 104 U. S., 291, 299, said: "It is next insisted by the defendant in error that the statute of Nebraska, according to which the will must be construed, favors the construction contended for by them. The

statute declares every devise of land in any will hereafter made shall be construed to convey all the estate of devisor therein which he could lawfully devise, unless it shall appear by the will that the devisor intended to convey a less estate. General Statutes of Nebraska, section 124, chapter 17. We are at loss to see how the statute supports the view of one party to this suit more than the other. According to the construction of the plaintiff in error, the devise vested in the widow of the devisor a life estate, remainder in fee to his children; according to the construction of the defendants in error, it vested the fee in the widow. By either construction the devise conveyed all the estate of the testator in the property devised. This all the statute demands."

It was the right of this court to decide the case brought before it in an orderly litigation. In doing so it was also justified in applying the state statute. Not only was this the right of this court; it was its duty to do so. As Mr. Justice Bradley says in Burgess vs. Seligman, *supra*, "It would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication." When this court had discharged this imperative duty in the exercise of its jurisdiction, the will was afterwards to be read in the light of its judgment, just as much so as it would have been read in the light of a state opinion announced before Giles vs. Little came there. Upon that subject we have said above all that we think need be said.

But passing that, let the manner in which Judge Maxwell dealt with the opinion of this court be noticed. He points out an inaccuracy in the quotation of the statute by

Mr. Justice Woods because the word "clearly" is omitted. That will be noticed in a moment. He then says that Mr. Justice Woods gave no weight to the section. The learned Judge who delivered the opinion of the state court certainly could not have read the whole of the opinion of this court. The paragraph thereof quoted above must have escaped his attention.

Recurring to the inaccuracy of Mr. Justice Woods noted above in omitting the word "clearly" so that it reads "unless it appears by the will that the devisor intended to convey a less estate," whereas it should have read "unless it *clearly* appears," etc., it is quite enough to say that the opinion of this court was not in the least affected by the error.

It appears not only from the view which the court took of the meaning of the testator, but also from the nature of the word "clearly" as was said in Brimmer vs. Sohier, 1 Cush., 132, where the same word was used in a similar statute: "It is not supposed that the intensives 'clearly and manifestly,' as in this section, can have any well defined or precise effect in the construction of wills. They are too vague and indeterminate to form a rule of much practical use. The statute requires undoubtedly that the intention of the testator should be fairly inferrable from the will, but it does not require an express declaration."

It may not be amiss to say that Judge Maxwell does not examine the reasons for the opinion of the federal court nor the cases cited in it. These cases were Smith vs. Bell, 6 Peters, 68 (1832), and Brant vs. Virginia Coal & Iron Co., 93 U. S., 320 (1876), not to mention Green vs. Hewett in the supreme court of Illinois. The judgments of this court

were decisive of the question, and left nothing in Giles vs. Little but the application of the principle laid down in them. And of the three cases cited by Judge Maxwell this may be said, that the second and third do not rest upon the principle asserted by him, while the first is not well considered nor did it necessarily involve this question.

The statute cited by Judge Maxwell in respect of the use or omission of the word "heirs" did not change the common law; indeed the clause cited by him from Jarman shows this. That author there states that before 1838, when the English statute was passed, any expression, however informal, which denotes the intention to devise the fee will answer for the word heirs.

This was held in Clark vs. Bever, 139 U. S., 96. The statute of Iowa provided that stockholders of corporations should be held liable for unpaid installments of their stock. Green took the stock of a company at twenty-five per cent in payment of his debt, and the question was whether he was liable for the seventy-five per cent remaining unpaid. The court held that he was not, but several cases in the state court were cited as concluding the question here. Mr. Justice Harlan dealt with that contention at page 116, and, after finding that the statute was simply an enactment of the general rule, said "that the decisions of the state courts are not, therefore, to be regarded as resting upon a local statute, but only as expressing the views of that tribunal in respect to the same principles of general law announced by this court, after the fullest consideration, in the numerous cases to which (we) (he) had referred."

In addition to the cases cited in support of the first posi-

tion in our brief, we add Carroll County vs. Smith, 111 U. S., page 556, which was a case brought on bonds issued by the county. The defense made was that the bonds had not been issued in conformity with the requirements of the state constitution, and a construction of that constitution was necessary. This court declined to follow the decision of the supreme court of Mississippi in the construction of its own constitution, and in its opinion lays down the following doctrine:

"The decision in Hawkins vs. Carroll County, above referred to, is not a judgment of the supreme court of Mississippi construing the constitution and laws of the state which, without regard to our own opinion upon the question involved, we feel bound to adopt and apply to the present case. It is a decision upon the very bonds here in suit, pronounced after the controversy arose, and between other parties. *It was not a rule previously established so as to have become recognized as settled law, and which, of course, all parties to transactions afterwards entered into would be presumed to know and to conform to.* When, therefore, it is presented for application by the courts of the United States in the litigation growing out of the same facts, of which they have jurisdiction by reason of the citizenship of the parties, *the plaintiff has a right under the constitution of the United States to the independent judgment of these courts* to determine for themselves what is the law of the state by which his rights are fixed and governed. *It was to that very end* that the constitution granted to citizens of one state suing in another the choice of resorting to federal court. Burgess vs. Seligman, 107 U. S., 20 (27, 359). We have, however, considered the reasoning of the supreme

court of Mississippi in its opinion in the case of Hawkins vs. Carroll County with the respect which is due to the highest judicial tribunal of a state speaking upon a topic which it is presumed to have peculiar fitness for a correct decision; and while we are bound to admit the carefulness of its examination of the question, we are not able to adopt its conclusion."

Gibson vs. Lyons, 115 U. S., 439, was a case involving a construction of the Pennslyvania ejectment laws and is a similar action to the one at bar. In that case the influence of state decisions upon local laws in federal courts was considered and the principle laid down as follows:

"It is urged by counsel for defendant in error that the judgment of the supreme court of Pennslyvania in the ejectment suits in favor of the defendants against the immediate grantors of the present plaintiffs below, referred to in the eighth finding of fact, if not entitled to the force of an estoppel as *res judicata*, is at least an authoritative decision of the highest court of the state upon the law of the case, which, as it involves only questions of title to real estate within its territory dependent upon its local jurisprudence, ought to furnish the obligatory of decision for the courts of the United States. * * * As a precedent, the decision of the supreme court of the state, though single, is entitled to peculiar respect, because all questions decided arise upon the local law of the state, *but it cannot have conclusive force in the courts of the United States unless it has become a rule of property* (citing Burgess and Carroll county cases). The plaintiff in error, being a citizen of New Jersey, *had a constitutional right by virtue of that*

fact to invoke the jurisdiction of the courts of the United States, and is entitled to their judgment upon his rights under the laws of Pennslyvania.

Anderson vs. Santa Anna Township, 116 U. S., 356, was the next case in which this question was discussed, and the court, reciting at length the language quoted from Burgess vs. Seligman, reaffirmed the principle laid down in that case, and added :

"While the courts of the United States accept and apply the construction of a state constitution or local statute upon which the rights of the parties depend, *which has been fixed by a course of decisions in the state court, it is the settled doctrine of this court that rights accruing under one construction will not be lost merely by a change of opinion in the state court, and where such rights have accrued before the state court has announced its construction* the federal courts, although leaning to an agreement with the state court, must determine the question upon their own independent judgment."

See also the cases of—

Pease vs. Peck, 18 Howard, 595.
Morgan vs. Curtennius, 20 How., 1.
Bertz vs. Muscatine, 8 Wall., 575.

Again in the late case of Baltimore and Ohio R. R. Co. vs. Baugh, 149 U. S., page 368, Mr. Justice Brewer in reviewing this interesting question says :

"Whether the engineer and fireman of the locomotive engine running along on a railroad and without any train

attached are fellow servants of the company, so as to preclude the latter from recovering from the company for injuries caused by the negligence of the former, is not a question of local law to be settled by the decisions of the highest court of the state in which a cause of action arises, but is one general law, to be determined by a reference to all of the authorities and a consideration of the principles underlying the relations of master and servant.

In the ordinary use of language it will hardly be contended that the decisions of the courts constitute laws. They are, at most, only evidence of what the laws are, and are not of themselves laws. They are often re-examined, reversed, and qualified by the courts themselves, whenever they are found to be either defective or ill founded or otherwise incorrect. The laws of the state are more thoroughly understood to mean the rules and enactments promulgated by the legislative authority thereof, the long established local customs having the force of laws.

Mr. Justice Brewer on pages 372 and 373 has reviewed at length the case of Burgess vs. Seligman and has cited with approval in almost the exact language set up in our former briefs filed in this court in this same action nearly three years ago.

Is it a question of local law in the state of Nebraska to determine what the intention of Jacob Dawson was when he signed his will? Is it a question of local law, or does it make a rule of property relating to all real estate in the state of Nebraska, to have Chief Justice Maxwell of the supreme court of Nebraska determine the intention of the

testator in making a will so as to preclude this court from adhering to a construction of that will *first determined by this court?* Is it not merely a question of general law to be determined by a reference to all the authorities and a consideration of the principles underlying the mere interpretation of wills? Must not each particular will be construed by a reference to all the authorities to correctly determine the intention of the testator, and is not the language of Mr. Justice Brewer so recently uttered decisive of this question?

And again the decision of Judge Maxwell will undoubtedly be re-examined, reversed, and qualified by the supreme court of Nebraska the very first time the same principle is before that court for hearing. It is so clearly defective, ill-founded, and incorrect that the supreme court of Nebraska as now composed would undoubtedly refuse to follow that decision, and then this court would be compelled to go back to where it now stands. This court will not attempt to follow the mutations of opinion of western courts consequent upon an elective judiciary and intermittant political revolutions.

In the brief of plaintiff in error it was stated that Lewis purchased this property long after he had knowledge of a contrary decision of the district court of Lancaster county, Nebraska. This statement is unfortunate for the plaintiff in error, for that decision is here in this court in Giles vs. Little, 134 U. S., 645. May —, 1887, is the date of the Lewis deed. Date of decree by Judge Chapman was in the following December, exact date being December 14, 1887 (see volume 21, transcript of records, in office clerk of the

supreme court, page 65). This decree of Judge Chapman was the first decree ever made in the state courts upon Jacob Dawson's will. Chapman was judge of the district court of Lancaster county, Nebraska.

In an action pending in the United States circuit court for the district of Nebraska, entitled Stetson vs. Bohanan *et al.*, at the May, 1888, term of court, Mr. Justice Brewer, then circuit judge for that circuit, followed and approved of the opinion in Giles vs. Little, 104 U. S., 291.

In answer to the argument of counsel as to the merits of the decision of this court in Giles vs. Little, it would, perhaps, be enough to refer to the opinion of Mr. Justice Woods, wherein all the points made by counsel are considered and disposed of. But it may not be out of place to review briefly the opinion of the supreme court of Nebraska, in Little vs. Giles, as we feel confident that an examination of the reasons given for its construction of the will in question will show that it is not such a construction as this court would adopt.

The criticism which Mr. Chief Justice Maxwell (lately retired) makes at the outset upon the opinion in Giles vs. Little, namely that the opinion gives no effect to the statute of Nebraska as to construction of devises, is entirely unfounded. In the opinion in this court, Mr. Justice Woods expressly notices the statute and points out that it has no application. Nor has the fact that he omitted the word "clearly" in transcribing the statute, upon which stress is laid in the opinion of Mr. Chief Justice Maxwell, any significance. The statute in question is one of the many

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statutes in this country which are substantially based on the Massachusetts Wills Act. The words in question are practically the same in each statute, the Massachusetts act reading "clearly and manifestly." The courts of Massachusetts have long ago established that the word "clearly" in this connection means "according to the ordinary rules of construction" and nothing more.

Brimmer vs. Sohier, 1 Cush., 118, 132.

The intent of the statute is that words of inheritance are no longer necessary.

Areson vs. Areson, 3 Denio, 458.
Allen vs. Allen. 18 How., 391.
Dew vs. Kuehn, 64 Wis., 300.

And so in respect to the same word in the clause as to after-acquired realty.

Winchester vs. Forster, 3 Cush., 366, 370.
Briggs vs. Briggs, 60 Iowa, 617.

This construction of the words "clearly appear" has never been questioned. The language of the courts of Michigan and Wisconsin quoted by Chief Justice Maxwell do not affect this interpretation in the least; on the contrary the decision of the supreme court of Wisconsin is in perfect accord with it. The omission to copy the word "clearly," therefore, is a matter of no moment.

But Chief Justice Maxwell does not rely upon this point. The point upon which his decision really goes is not that Mrs. Dawson took an estate in fee simple, but that the lan-

guage of the will gives her an absolute power of disposition during widowhood. This is effectually disposed of in the opinion of Mr. Justice Woods, and a review of the authorities upon which Chief Justice Maxwell reaches his determination discloses nothing of any force to alter the decision of this court.

In Weir vs. Michigan Stove Co., 44 Mich., 506, the testator devised all his property to his wife and directed that the half of the residue after her death should be "paid" to his sisters. The court point out that the language used cannot be held to indicate a division of real estate and nothing else.

Dew vs. Kuehn, 64 Wis., 293, is in accord with the Massachusetts cases above cited, and shows that the words "clearly appear" have no other significance than "according to the ordinary rules of construction." There by construction a devise was held to pass a life estate only, though the devise was one to Kuehn *simpliciter* and the language from which the conclusion was reached was in a bequest of chattels.

In Robbins vs. Robbins, 9 S. W. (Ky.), 254 (not in official reports), there were devises to a wife "to do with as she might think fit." There were no devises of remainders in any of the property. This was a plain case for application of the statute and has no application to such a case as the one at bar.

Kaufman vs. Breckinridge, 117, Ill., 315, is readily distinguishable, and does not at all support the construction put upon the will in question by the learned chief justice.

In that case the testator gave all his estate, real and personal, to his wife so long as she should remain his widow "to be disposed of and used agreeably to her discretion and approval in such manner as she may deem most conducive to the welfare and comfortable subsistence of herself and our beloved children." It also provided that she and her children should live upon the testator's homestead and that the homestead should not be sold. The court lay great stress upon the fact that by the terms of the will the wife and children were to be maintained and the homestead kept up out of the property, and point out that the evident intention of the testator could only be effected by a sale of the property and that the words "no sale shall be made of the homestead" imply a sale of the other property. Moreover there was no express remainder over. None of the circumstance upon which the court bases its conclusion are to be found in the case at bar. No mention is here made of any provision for the children. They are to take nothing until the widow's estate terminates—by marriage or death—and then they take the whole estate for all purposes. Besides the amount and character of the property disposed of in the two wills is very different.

In Henderson vs. Blackburn, 104 Ill., 229, the court cite and approve the decision of this court in Giles vs. Little, but distinguish it from the case before them. In that case there was no devise for life or during widowhood, and nothing to show that the devise was not absolute. The court point this out.

In Pruden vs. Pruden, 14 Ohio St., 251, there was a gift of real and personal property to the testator's wife "*for her*

benefit and support," and for her to have and to hold during the term of her natural life. The will also provided, "And in case my said wife shall survive me, I devise *any and all* of the estate and property, real and personal, above devised, that at my said wife's decease shall remain," etc.; and also this provision: "All the moneys realized from sale of my real and personal estate to be paid over to my said wife." The court held that the support of the widow was made a charge upon the land.

In Helmer vs. Shoemaker, 22 Wend., 137, there was no express limitation for life in the devise; the estate was devised absolutely. So in VanHorn vs. Campell, 100 N. Y., 496.

In State vs. Smith, 52 Conn., 562, there was an express power "to sell and convey and use *without any restriction whatever*." The court rely largely upon the italicized words.

The cases cited by the learned chief justice in support of his criticism of the construction put upon the words "whatever shall remain" by this court, are equally inapplicable. In Campbell vs. Beaumount, 91 N. Y., 464, there was an absolute gift to testator's wife followed by a gift over to her son in case of lapse. Nothing further from the case at bar could be conceived.

Helmer vs. Shoemaker has been considered above.

In McDonald vs. Walgrove, 1 Sandf., Ch., 274, there was an express power to sell in the devise for life, followed by a devise over of any part that "might remain unsold" at her death. The case of Attorney General vs. Hall,

Fitz-Gibbon, 314 (which the learned chief justice cites as "Litz"), needs no comment.

In Ide vs. Ide, 5 Mass., 500, there was an express devise in fee simple, followed by a devise over, on death of the devisee without issue, of what he "should leave." This case and the foregoing could only apply in case there was devise to Mrs. Dawson in fee. The will in question clearly gives her an estate for life or during widowhood only. Allowing to the words "clearly appear" all the force possible, the language of Mr. Justice Woods is still perfectly justified: "It would be hard to express more clearly the purpose of the testator to devise to his wife an estate during her widowhood, and on its determination a remainder in fee to his children."

A review of the cases cited by Mr. Justice Woods or citation of the many other cases which sustain his construction is unnecessary, since nothing has been adduced of force to shake his conclusion in any degree.

All that the record shows in this case is a copy of the will; none of the surrounding circumstances are shown. The certificate of the court of appeals is all this court has before it, and this court will hesitate to overrule the well considered, full, complete, unanimous opinion of the court delivered by Mr. Justice Woods, in a case where the record disclosed all facts and circumstances surrounding the testator at the time of his death.

For the several reasons stated above we submit that this court should adhere to the construction given this will in

1881 in Giles vs. Little, 104 U. S., relying upon which the plaintiff purchased the premises.

SECOND POINT.

The plea of the Statute of Limitation cannot be sustained. Upon the construction of the will given by this court, Mrs. Dawson had the right of possession until her marriage with Pickering, on the 14th of December, 1879. Neither the testator's children nor their grantees had any right of action before that day. This action was brought on the 11th of June, 1887, a little more than seven years after the cause for it accrued. The Statute of Limitation in such cases is ten years. Section 6 of title 2, of Code of Civil Procedure, Comp. Laws of 1887, page 741, provides that "an action for the recovery of the title or possession of lands, tenements, or hereditaments can only be brought within ten years after the cause of such action shall have accrued."

This question presented upon a very similar state of facts has been ruled by the supreme court.

Zeller's Lessee vs. Eckert, 4 How., 289.

J. M. WOOLWORTH,
L. C. BURR,
Of Counsel for Defendant in Error.